A TREATISE

UPON THE

EMPLOYERS' LIABILITY ACT

A. H. RUEGG

Clerke and Brett's Conveyancing and Law of Property Act, 1881, and other Acts. In 1 vol. Post 8vo. 6*s.* 6*d.* cloth.

Robson's Bankruptcy Practice. 4th Edition. In 1 vol., 8vo. 38*s.* cloth.

Sir T. Erskine May's Parliamentary Practice. 8th Edition. 8vo. 2*l.* 2*s.* cloth.

Bund's Law of Salmon Fisheries, 1876. Post 8vo. 16s. cloth.

Kelly's Conveyancing Draftsman. 2nd ed. Post 8vo. 12s. 6d.

Redman's Law of Arbitrations and Awards. 8vo. 12s. cloth.

Redman's References under the Judicature Acts. 8vo. 2s. cloth.

Hunt's Law of Frauds and Bills of Sale. Post 8vo. 9s. cloth.

Seaborne's Law of Vendors and Purchasers of Real Pro-perty. 2nd Edition. Post 8vo. 10*s.* 6*d.* cloth.

Fawcett's Law of Landlord and Tenant. 8vo. 14s. cloth.

Saunders's Law applicable to Negligence. Post 8vo. 9s. cl.

Shelford's Law and Practice of Joint Stock Companies. 2nd Edition. By D. PITCAIRN and F. L. LATHAM. 8vo. 21*s.* cloth.

Shelford's Law of Railways. 4th edit. By W. C. Glen, Esq. In 2 vols. Royal 8vo. 63*s.* cloth.

Clark's Digest of House of Lords Cases from 1814 to the present Time. Royal 8vo. 31*s.* 6*d.* cloth.

Ingram's Law of Compensation for Lands and Houses. 2nd Edition. By ELMES. Post 8vo. 12*s.* cloth.

Coombs' Solicitors' Bookkeeping. 8vo. 10s. 6d. cloth.

Coote's Admiralty Practice. 2nd Edition, with Forms and Tables of Costs. 8vo. 16*s.* cloth.

Bainbridge's Mines and Minerals. 4th Edition. 45s. cloth.

Trower's Church, Parsonage and Schools Building Laws, continued to 1874. Post 8vo. 9*s.* cloth.

Rouse's Practical Conveyancer. 3rd ed. 2 vols. 8vo. 30s. cl.

Sir Robert Phillimore's International Law. 3rd Edition. Vol. 1. 24*s.* cloth.

*** *2nd Edition, Vol.* 3, *price* 36*s.*; *and Vol.* 4, *price* 34*s.*, *may be had separately to complete set.*

☞ *A Third Edition of Vol.* 2 *is in the Press.*

Hunt's Law of Boundaries and Fences and Rights of Waters. 2nd Edition. 12*s.* cloth.

Rouse's Copyhold Enfranchisement Manual. 3rd Edition. 12mo. 10*s.* 6*d.* cloth.

Dixon's Law of Partnership. 8vo. [illegible]s. cloth.

Barry's Practice of Conveyancing. 8vo. 18s. cloth.

Woolrych on the Law of Sewers, with the Drainage Acts. 3rd Edition. 8vo. 12*s.* cloth.

Tudor's Leading Cases on Real Property, Conveyancing, Wills and Deeds. 3rd Edition. Royal 8vo. 2*l.* 12*s.* 6*d.* cloth.

Phillips's Law of Lunatics, Idiots, &c. Post 8vo. 18s. cloth.

Powell's Law of Inland Carriers. 2nd edit. 8vo. 14s. cloth.

Christie's Crabb's Conveyancing. 5th Edition, by Shelford. 2 vols. Royal 8vo. 3*l.* boards.

Wigram's Extrinsic Evidence in the Interpretation of Wills. 4th Edition. 8vo. 11*s.* cloth.

*** *For complete Catalogue, see end of this Book.*

A TREATISE

UPON THE

EMPLOYERS' LIABILITY ACT,

1880.

A Treatise

UPON THE

EMPLOYERS' LIABILITY ACT, 1880

(43 & 44 VICT. CAP. 42).

BY

ALFRED HENRY RUEGG, ESQUIRE,

OF THE MIDDLE TEMPLE AND WESTERN CIRCUIT,

Barrister-at-Law.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

HODGES, FOSTER & CO., GRAFTON STREET, DUBLIN.

CALCUTTA: THACKER, SPINK & CO. MELBOURNE: GEORGE ROBERTSON.

1882.

LONDON:
PRINTED BY C. F. BOWORTH, BREAM'S BUILDINGS, CHANCERY LANE.

PREFACE.

ALTHOUGH the publication of a separate Text-book devoted to the consideration of so short an Act of Parliament as the Employers' Liability Act, 1880, may almost appear to have been unnecessary, yet, when it is remembered that the Act is the result of years of agitation on behalf of a very numerous class of persons, who are directly affected thereby, and to whom it is of the first importance that their present legal position in their employment should be accurately ascertained, I venture to hope that the production of this work may not be regarded as altogether unwarranted.

I have found myself unable entirely to realize what I wished the book to be; indeed, I fear that I may be thought to have sometimes gone to the extremes of being at one time too elementary, and at another time hypercritical.

I have, however, found it impossible to avoid laying myself open to this censure without falling into grave errors.

The book, such as it is, I now with some diffidence submit to the judgment of my profession, particularly to that branch of it for whose assistance it is mainly intended.

A. H. R.

3, Essex Court, Temple,
November, 1881.

CONTENTS.

TABLE OF CASES.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

R.

S.

A TREATISE

UPON

THE EMPLOYERS' LIABILITY ACT, 1880,

(43 & 44 VICT. c. 42).

INTRODUCTION.

As many actions will probably be brought in the various County Courts under "The Employers' Liability Act, 1880" (43 & 44 Vict. c. 42), by workmen against their Employers, to obtain compensation for injuries happening to them whilst engaged in the Employer's service, it is necessarily important that solicitors, in whose hands the conduct of such actions will in the main rest, should have a handy means of reference, both as to the law, and the procedure appertaining thereto.

The main object of the present work being to furnish such information, it is proposed to examine but briefly the condition of the law as it existed previously to the passing of the Act, and the history of the Act itself; these subjects being of small practical value to the solicitor who wishes to ascertain the probabilities of success or failure of his client, suing, or being sued, at the present time.

CHAPTER I.

THE LAW AS IT EXISTED PREVIOUSLY TO THE ACT, AND THE "DOCTRINE OF COMMON EMPLOYMENT."

THE whole of the liability of Employers under the present Act is based upon, and will be found to be an amplification of, the following two well-known principles of the common law.

1. "A person guilty of negligence is liable to make good any pecuniary damage resulting therefrom to another, provided that such damage can with sufficient directness be traced to the negligence."
2. "A person who commits a wrongful act by means of another is (subject to the same qualification stated above) liable for its consequences." *Qui facit per alium, facit per se.*

It can at once be seen that, if these maxims had been fully accepted and followed by the courts to their logical results, they would have included the case of a workman injured whilst in his employment, either through the negligence of the Employer himself or that of a fellow-workman, and the Employers' Liability Act would have been unnecessary.

These rules, however, have been, perhaps from the first times of their acceptance as legal rules, regarded as subject to important modifications.

Until the year 1846, in consequence of the strict adherence of the courts to another legal maxim, viz., that "a personal action dies with the person entitled to

maintain it" ("*Actio personalis moritur cum personâ*"), no one was liable to make compensation to the representatives of a person who had been killed through his negligence.

This has now been altered by Lord Campbell's Act (*a*), which declares that an action may be brought where the negligence has resulted in death, at any time within twelve months from the death, by the executor or administrator of the deceased, for the benefit of the wife, husband, children, grandchildren, parents, grandparents (*b*), amongst whom the damages awarded are to be proportioned by the jury.

By an amending act (*c*), if the action is not commenced by the executor or administrator within six months from the death, it can be brought in the names of any or all of the relatives above named.

In further limitation of the rules under consideration, the courts formerly held that if the wrongful act causing damage amounts to a felony, the civil action for damages is postponed until the offender has been prosecuted, and public justice thus first satisfied (*d*); and by express statute (*e*), if a defendant summoned before magistrates for an assault and battery shall have obtained a certificate of dismissal, or shall have suffered

(*a*) 9 & 10 Vict. c. 93.

(*b*) The words "children" and "parents" here include step-children and step-parents. Sect. 5.

(*c*) 27 & 28 Vict. c. 95.

(*d*) But see case of *Wells* v. *Abraham*, as interpreted in Vol. I. of Smith's Leading Cases, p. 317, where a doubt is expressed as to whether this rule any longer exists; and *Osborne* v. *Gillett*, L. R., 8 Ex. 88; 42 L. J., Exch. 53, where it is expressly decided that it is no answer to an action, under Lord Campbell's Act, that the act causing injury was a felony, and that the offender has not been prosecuted.

(*e*) 24 & 25 Vict. c. 100, s. 44.

the punishment inflicted, this shall be an absolute bar to any civil proceedings in respect of such assault and battery.

By far, however, the greatest inroad made upon the rules of the common law which have been stated, was the recognition by the courts of a principle, the result of which was almost entirely to relieve Employers of labour from any liability for injuries happening to their workmen in their employment; although such injuries might have been caused indirectly by the Employer's own negligence.

This doctrine, now well known by the name of the "*doctrine of common employment*," may be stated as follows:—*If the person occasioning and the person suffering the injury are fellow-workmen, engaged in a common employment, the Employer is not responsible.* In other words: *For injury caused to a workman at the hands of a fellow-workman there was, as a general rule, no remedy against the common Employer.*

The law, however, has always imposed upon Employers the obligation of selecting workmen and machinery *reasonably capable* of doing their, or its, required work in a proper and safe manner; but, these conditions being fulfilled, he has been relieved from all liability save for direct personal negligence (*e*).

But, although the Employer does not warrant the competency of his servants or of his materials (*f*), yet, when one of his workmen has been injured, through defective material, or the incompetence of a fellow-workman, the onus has always lain upon him of showing not only that he was unaware of the defect or incom-

(*e*) *Brown* v. *Accington*, 3 H. & C. 511.

(*f*) *Ormond* v. *Holland*, E., B. & E. 102.

petence, but also that he exercised reasonable care in making his selection (*g*). See post, pp. 46—49.

The "*doctrine of common employment*" is supposed by some to be an ancient doctrine, although it appears to have been fully discussed judicially, for the first time, less than fifty years ago.

The case of *Priestley* v. *Fowler* (*h*), decided in the year 1837, was an action brought against a butcher by one of his servants to obtain damages for injuries caused to him, according to his allegation, in consequence of the overloading of his master's van in which he had been ordered to ride. It appeared from the evidence that the van was in the charge of a fellow-servant, to whose negligence the overloading was attributable, and it was decided, *expressly upon this ground*, that the servant injured could not recover compensation from his master.

No authority was given by Abinger, C. B., in support of his judgment in this case; but he appears to have been influenced in his decision by the fear that if this principle of liability, which he speaks of as a "novel" one, was once admitted, it would be impossible to say where actions of such nature would stop. Indeed, in delivering his judgment, he attempts to turn the principle into ridicule by stating imaginary cases of a master being made liable to his servant who had been put into a damp bed by his chamber-maid, made to fall out of a crazy bedstead by his upholsterer, made ill through the cook not cleaning out the saucepans, or injured, with the master himself, through the falling of the house, owing to the negligence of the builder.

(*g*) *Hoey* v. *The Dublin and Belfast Rail. Co.*, 1 Ir. R., C. L. 206.

(*h*) 3 M. & W. 1.

By such a system of reasoning it would not be difficult to reduce to an absurdity even well-established, and admittedly sound, legal principles.

But later cases, whilst they follow the principle laid down in *Priestley* v. *Fowler*, appear to be decided upon somewhat sounder reasoning, viz., that the servant knew that he incurred the risk of injury through any negligence of his fellow-servants at the time he chose to enter into the employment, and so must be deemed to have taken the risk voluntarily.

The next English case in which the "*doctrine of common employment*" came before the courts was *Hutchinson* v. *The York, Newcastle and Berwick Rail. Co.* (*i*), decided in the year 1850, upon the above reasoning. In delivering judgment, Alderson, B., says, "they" (*i. e.*, the servant causing and the servant suffering the injury) "have both engaged in a common service the duties of which impose a certain risk on both of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow-servants, *and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk.*"

By far, however, the ablest advocacy of the doctrine

(*i*) 5 Exch. 343; 19 L. J., Exch. 296; approved in *Wiggett* v. *Fox*, 11 Exch. 832. And see a late case *Lovell* v. *Howell*, 1 C. P. Div. 161; 45 L. J., C. P. 387, where this principle is expressly laid down as the true one by which the liability of a master towards his servant is to be tested.

is contained in the judgment of Shaw, C. J., in the American case of *Farwell* v. *The Boston and Worcester Rail. Co.* (*j*), where he says as follows:—"Where several persons are employed in the conduct of a common enterprise, and the safety of each depends upon the care and skill with which each other shall perform his duty, each is an observer of the conduct of the others, can give notice of misconduct, incapacity, or neglect, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity, in case of loss by the negligence of each other."

The principle that a workman, who enters into an employment, takes all the risks incidental thereto being once admitted, has been since repeatedly followed. Thus in *Wigmore* v. *Jay* (*k*), where the administratrix of a bricklayer sued under Lord Campbell's Act for damages for loss sustained by her husband's death whilst in defendant's employment; judgment was given for the defendant, upon the ground that the negligence which led to the injury was that of the defendant's foreman, who was a fellow-workman with the workman injured.

In the year 1858, the case of *The Bartonshill Coal Co.* v. *Reid* (*l*), brought to the House of Lords on appeal from the Court of Session in Scotland, firmly and finally established not only the fact that the law of

(*j*) 4 Metc. (Massa.) Reps. 49.

(*k*) 5 Exch. 354. See also *Seymour* v. *Maddox*, 16 Q. B. 326; 20 L. J., Q. B. 327.

(*l*) 3 McQ. H. L. Ca. 266.

the two countries with respect to "*common employment*" was identical (*l*), but also the general doctrine itself, on such authority and after such research that it has, as a proposition of law, never since been questioned.

The dispute was as to whether a company of mine-owners was responsible under Lord Campbell's Act, to make compensation to the family of one of their miners, who was killed whilst being drawn up out of the mine, through the negligence of the company's engineer. Held, that the company was not liable. Lord Cranworth in delivering judgment, after two years' consideration, thus ably sums up the law on the subject:—

"When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say that the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, appears to me to be opposed to the doctrine, that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-

(*l*) Previously to this decision, the Scotch courts had not adhered so strictly to the doctrine of "*common employment*" as had the English courts. See *Paterson* v. *Wallace*, 1 McQ. H. L. Ca. 748, where the difference between the English and the Scotch law is discussed by the House of Lords.

workman in respect of evil resulting from the carelessness of a fellow-workman, when engaged in a common work."

So came the "*doctrine of common employment*" to be established. This having been done, it became at once necessary to decide who are included within it, *i. e.* what persons are so far fellow-workmen, as in law to be deemed to be in a common employment. No general rule can be laid down by which this question can be tested, and the courts have never attempted to lay down such a rule. The question is one which must most often be decided upon the particular facts in each case. The respective grades and functions of the workman will as a rule make no difference, *i. e.* a general traffic manager of a railway company has been held to be a fellow-workman with a milesman employed by the same company (*m*); a chief engineer with an ordinary seaman employed on the same vessel by the same employers (*n*); a railway guard with a ganger of plate-layers employed by the same railway company (*o*); and a builder's labourer with his foreman (*p*).

The difficulty usually arises when a contractor, or sub-contractor, has been appointed to do a part of a particular work, and for such purpose to engage his own

(*m*) *Conway* v. *The Belfast and North Counties Rail. Co.*, 11 Ir. R., C. L. 345.

(*n*) *Searle* v. *Lindsay*, 11 C. B., N. S. 429; 31 L. J., C. P. 106.

(*o*) *Waller* v. *The South Eastern Rail. Co.*, 2 H. & C. 102; 32 L. J., Exch. 205.

(*p*) *Wigmore* v. *Jay*, 5 Exch. 354; 19 L. J., Exch. 300; ante, p. 7. See also *Howells* v. *The Landore Steel Co.*, 10 L. R., Q. B. 62; 44 L. J., Q. B. 25; and *Allen* v. *The New Gas Co.*, 1 Exch. Div. 251; in both of which cases the negligence was that of a manager. See also speech of Mr. Dodson in the House of Commons, June 3rd, 1880, Hans. vol. 252, pp. 1086—1092.

workmen, such workmen being employed more or less in connection with other workmen employed by the chief employer. Of course there is no question that if the contractor, or sub-contractor, exercises an entirely independent employment, and his servants are not only engaged and paid by himself, but are subject to his command and control alone, they do not become fellow-workmen with the servants of the chief employer, although engaged with them upon the same work. If, on the other hand, the person alluded to above as contractor, or sub-contractor, is really only an agent for the employer in engaging workmen; then, although the contract of service may be made between himself and the servants he engages, such servants may, notwithstanding, become fellow-workmen with those of the chief employer.

The decided cases upon this point are somewhat conflicting. In *Wiggett* v. *Fox* (*q*), it was decided that a workman employed by a sub-contractor who had undertaken to perform a part of a particular work was a fellow-workman with the servants employed by the chief contractor, and could not sue for compensation for injuries caused by the negligence of such fellow-workmen.

This case was decided upon the ground that the workmen were engaged upon the same work, and the workman injured had voluntarily incurred the risk.

It is thought that its authority is questionable upon such reasoning; although there appears to have been much evidence to show that the workmen really were fellow-workmen, as being all in the pay and under the control of the principal contractors.

(*q*) 11 Exch. 832.

But the case of *Vose* v. *The Lancashire and Yorkshire Rail. Co.* (*r*), was decided differently. In this case a railway servant, engaged in repairing an engine at a station in the joint occupation of the defendant company and the company by whom he was employed, was killed by an engine belonging to the defendant company. The administratrix of the deceased was held entitled to recover under Lord Campbell's Act, notwithstanding that the injury was traced to a defect in the rules, which were published by authority of both companies, and to which the workmen of both companies were bound to conform.

A similar decision upon like grounds was arrived at in the case of *Turner* v. *The Great Eastern Rail. Co.* (*s*). In this case the railway company employed a contractor to unload trucks at their sidings, and the plaintiff was employed and paid by such contractor, and the contractor had entire control of him. It was held that the plaintiff was not a fellow-workman with the servants of the company, and that he was, therefore, entitled to sue for injuries caused by their negligence.

To the same effect was the decision in the recent case of *Swainson* v. *The North-Eastern Rail. Co.* (*t*), where a signalman, employed and paid by the G. Railway Company, who had, as a part of his duty, to signal the trains of his own company and also those of the defendant company, was killed through the negligence of a servant of the latter company.

This last decision was arrived at expressly on the ground that the deceased man was not in any way

(*r*) 2 H. & N. 728; 27 L. J., Exch. 249. See also *Gallagher* v. *Piper*, 16 C. B. (N. S.) 669; *Feltham* v. *England*, L. R., 2 Q. B. 33; and *Wilson* v. *Merry*, L. R., 1 H. L. Sc. 326.

(*s*) 33 L. T. 431.

(*t*) 3 Exch. Div. 341.

under the orders and control of the defendants, the North-Eastern Railway Company. In delivering judgment, Brett, L. J., says, that for the principle of "*common employment*" to apply "there must be both a common employment and a common master."

But in a nearly contemporaneous case of *Charles* v. *Taylor* (*u*), the plaintiff, who had not been engaged by the defendant, was held to be a fellow-workman of the defendant's servants; there being evidence to show that he was employed upon the defendant's work, paid by the defendant, and subject to his rules.

The question whether or not the servants are engaged upon the same work, and are under the orders and control of the same master, appears to be the *ratio decidendi* of the later cases. It is strongly illustrated in the case of *Rourke* v. *The White Moss Colliery Co.* (*v*), where a company, having employed a contractor to sink a shaft, lent to him, during the time of the operations, the services of their own engineer, although they continued to pay the said engineer themselves. It was held, that although the engineer still continued the general servant of the company, he yet became a fellow-servant with the contractor's workmen.

If the master takes a part personally in the employment with his servant, he does not become a fellow-workman with him (*w*).

It has been often stated that the terms "*fellow-workmen*" or "*collaborateurs*" are not expressions very well suited to indicate the relation on which the liability or non-liability of a master depends. "The master is not and cannot be liable, except where there is negligence

(*u*) 3 C. P. Div. 492.
(*v*) 2 C. P. Div. 205.
(*w*) *Ashworth* v. *Stanwix*, 30 L. J., Q. B. 183.

on his part in that in which he, the master, has contracted or undertaken with his servants to do" (*x*).

A person who, without remuneration, voluntarily assists the servants engaged in some work, has been held to become by such assistance so far a fellow-workman with them that he cannot recover from their Employer in case he is injured by their negligence (*y*); but a person who in a transaction of *common interest* assists the servants of another, with their master's consent, does not place himself in the position of a fellow-workman (*z*). Probably, however, both these things are necessary to concur to prevent the volunteer from becoming a fellow-workman (*a*).

In proposed actions under the Employers' Liability Act, it will still be as necessary as heretofore to decide whether the servant inflicting and the servant suffering the injury are fellow-workmen in a "*common employment*"; for, as we shall hereafter see, the new Act does not by any means abolish the doctrine of "*common employment.*" If, after investigation, the conclusion is arrived at that the servants are not fellow-servants, the Act does not apply, but the Employers' common law liability remains.

(*x*) Judgment of Lord Cairns in *Wilson* v. *Merry*, L. R., 1 H. L. Sc. 333.

(*y*) *Degg* v. *The Midland Rail. Co.*, 26 L. J., Exch. 171; 1 H. & N. 773.

(*z*) *Wright* v. *The London and North Western Rail. Co.*, 1 Q. B. Div. 252; and *Holmes* v. *The North Eastern Rail. Co.*, L. R., 4 Ex. 254.

(*a*) As to whether the position of a volunteer is altered by the act, see post, p. 34.

CHAPTER II.

ORIGIN OF "THE EMPLOYERS' LIABILITY ACT, 1880."

THE law "*erected on the foundation of general policy and judicial reasoning*" having been settled as stated in the last chapter, caused much dissatisfaction; and, during late years, several of the workmen's associations have included in their programme the repeal of a doctrine which they regarded as so unfairly affecting their own classes.

The attention of Parliament having thus been called to the subject in the year 1877, a committee of the House of Commons was appointed, under the chairmanship of the late Sir Henry Jackson, to take limited evidence upon the subject, and to report to the House. To that committee a bill already prepared by Mr. Macdonald, providing for the total abolition of the "*doctrine of common employment*," was referred. The committee reported that, although they were unable to give a full assent to Mr. Macdonald's proposition, they nevertheless recommended that the existing law should be so far altered as to make the employer responsible for the acts of him who was designated as "*vice-master*."

Acting upon this report, the late government, in March, 1879, brought in a bill, which was read a first time, providing that corporations should be liable for injuries caused by the negligence of their manager or managers to workmen in the employ of the corporation.

This bill was withdrawn on the 30th July in the same year, but re-introduced into the House of Lords by the Lord Chancellor in February, 1880, and referred to a select committee, which never met (*a*).

In May, 1880, the present government brought in the present bill, which has been in force from the first day of January, 1881, under the name of "The Employers' Liability Act, 1880" (*b*).

The Act is indeed but a reproduction of a bill which had been brought before the House of Commons in the preceding year by Mr. Brassey. Mr. Dodson, in introducing the bill, stated that the object of the government was "to bring back the law to what it was supposed to be in England before the case of *Priestley* v. *Fowler*, and in Scotland up to the decision in *The Bartonshill Coal Company* v. *Reid*" (*c*).

The bill was considerably altered at various stages of its progress through Parliament; the alteration of, probably, the greatest practical importance being occasioned by the acceptance by the government of an amendment proposed by Mr. Morley, increasing the liability of railway companies (*d*).

The duration of the present Act was limited by an amendment, proposed in the House of Lords, to seven years from the day of its coming into operation, save as

(*a*) Earl De la Warr, who also had a bill before the House of Lords relating to this question, withdrew it at the request of the Lord Chancellor.

(*b*) 43 & 44 Vict. c. 42.

(*c*) This is incorrect; for if the decision in the case of *Priestley* v. *Fowler* was an innovation upon the common law, it introduced the "doctrine of common employment," which doctrine has certainly not been abolished by the present act.

(*d*) An amendment of Sir H. Giffard's, proposing to take entirely from railway companies the defence of "common employment," was refused by the government.

to actions which at the date of its expiry may have been already commenced thereunder.

The Act, as passed, is as follows:—

43 & 44 Vict. c. 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their Service.

[*7th September*, 1880.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:—

1. Where after the commencement of this act personal injury is caused to a workman

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or bye-law.

(3.) In any case where the workman knew of

the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of the cause of action arising under this act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been

made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

6.—(1.) Every action for recovery of compensation under this act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this act, unless the context otherwise requires,—

The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence,

and who is not ordinarily engaged in manual labour:

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

9. This act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this act referred to as the commencement of this act.

10. This act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of parliament, and no longer, unless parliament shall otherwise determine, and all actions commenced under this act before that period shall be continued as if the said act had not expired.

Before proceeding to an investigation of the Act in detail we may state its general effect as follows:—

Before its passing a workman could only recover, if injured in his employment, when he could prove that the Employer had himself been guilty of the negligence which led to the injury. Now he will also be *primâ facie* entitled to recover, where the Employer has delegated powers or duties to another, for negligence in the exercise of which he could himself have been held liable, and such other has occasioned the injury, by negligently performing the powers or duties delegated to him.

In no case are the damages recoverable to exceed in amount a sum equal to three years' wages; not necessarily of the plaintiff himself, but three years' average

wages of such a workman as the plaintiff in the same locality.

It also deserves notice that no penalty can be claimed under any Act of Parliament, when the action has once been brought under this Act, in respect of the same injury (*e*); and, if a penalty has been claimed, and paid, before the action is brought, the amount of the penalty so paid must be deducted from the damages recoverable (*f*).

(*e*) See section 5.

(*f*) See as to a penalty due for negligence causing personal hurt, The Factory and Workshop Act, 1878 (41 Vict. c. 16, s. 82); The Coal Mines Regulation Act (35 & 36 Vict. c. 76, s. 68); The Metalliferous Mines Regulation Act (35 & 36 Vict. c. 77, s. 38).

CHAPTER III.

THE CIRCUMSTANCES IN WHICH THE EMPLOYERS' LIABILITY ACT APPLIES.

It is a truism to observe that litigation should, where it is possible, be avoided; but particularly should this be borne in mind with respect to claims under the Employers' Liability Act.

In all cases will the costs of a successful defendant be precarious, whilst, it must be remembered, that a workman who goes to law with his Employer, risks not alone his money, but his employment also, upon the result of his action.

But, although it will unquestionably be the duty of the professional adviser of Employers or of workmen, carefully to consider these contingencies, and to endeavour to settle claims amicably, yet he must also remember that a compromise may be too dearly bought. If advising an Employer, he should especially recommend him to resist any claim which he considers involves a new principle of liability; or, where it appears to him that the amount of compensation claimed is extortionate.

With respect to those cases in which there is no alternative than bringing the dispute into a court of justice for decision, it is hoped that the following chapters may be of some service to the solicitors who may be engaged therein. They have been divided for the sake of convenience into sections, or heads, each containing a query of importance, and they are de-

signed to treat in sequence the various matters most necessary to be regarded, from the time the claim is made, until the action is finally disposed of. As it has, however, been found impossible to follow this course strictly, it is recommended to any professional reader, that he at all events glances at *all* the queries, or heads, which are suggested for his consideration, before he takes even the first step in an action under the Act. Of course he will perceive that he must throughout regard what he reads affirmatively, or negatively, according as he represents a plaintiff, or a defendant.

---

1. WOULD THE PLAINTIFF HAVE BEEN ENTITLED AS A STRANGER? or, in other words, if the plaintiff had not been in the defendant's employment at the time he sustained the injury would he have had a right of action?

Here we must at once observe, for it is important, that the new Act, where it applies, does not give to workmen any greater rights than a member of the general public had before (*a*). The same defences, and to the same degree, will be available to the Employer, as would be available to him, had the action been brought against him by a stranger, to obtain compensation for an injury caused by the negligence of his servant.

These defences are:—

(a) *That the act of the servant causing the injury was wilful;*

(b) *That such servant, when he occasioned the injury, was not acting within the scope of his employment;*

(c) *That the injury was unavoidable;*

(*a*) See sect. 1 of the Act 43 & 44 Vict. c. 42.

(d) *That the plaintiff was a trespasser, or a mere licensee;*

(e) *That the plaintiff himself was guilty of contributory negligence.* (As to this see post, Chapter on "Contributory Negligence.")

(a) The general rule is, that the master is never liable for the wilful wrong-doing of his servant.

If it can be shown that the servant was acting without his master's authority, either express or implied, and that he caused the injury to gratify his own personal spite, and not merely to further his master's interests by wrong; the action can be brought against the servant himself, but not against his master (*b*).

(b) If the servant, in causing the injury, was acting outside the scope of his master's employment, the master is not responsible.

This does not mean that the master is exonerated merely from the fact that the servant was doing what he was forbidden to do. The true rule is, as stated by Cockburn, C. J., in *Storey* v. *Ashton* (*c*), where he says, "The master is responsible only so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. I am far from saying that if a servant, when driving on his master's business, took a somewhat longer road than necessary, that, owing to this deviation, he would cease to be in the employment of the master, so as to divest the latter of all liability;

(*b*) *Croft* v. *Alison*, 4 B. & A. 590; *M'Manus* v. *Cricket*, 1 East, 106. And see the judgment of Blackburn, J., in the case of *Limpus* v. *The London General Omnibus Co.*, 32 L. J., Exch. 34; 1 H. & C. 526; as to racing omnibuses, which case does not alter the rule laid down, although in it the company was held liable.

(*c*) L. R., 4 Q. B. 476.

in such cases it is a question of degree how far the deviation could be considered a separate journey."

In the above case it was held that a servant who ought to have driven his master's cart, direct from the Minories to Blackheath and back, yet on his way home made a détour to perform an errand for a friend of his own, and whilst on such détour injured the plaintiff, could not make his master liable as he was not at the time acting within the scope of his duties.

As to the same subject Maule, J., has said:—"The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he was employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant" (*d*).

A high legal authority, Parke, B., applies the same principle, to decide the master's liability, in the case of *Joel* v. *Morrison* (*e*), saying: "If he (the servant) was going out of his way against his master's implied commands when driving on his master's business he will make his master liable, but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

In strict conformity with the principle last mentioned was the decision in *Burns* v. *Poulsom* (*f*). In this case a stevedore who was engaged to load a vessel with iron rails, employed a foreman whose duty was to carry the rails from the quay to the ship, after they were placed upon the quay by the carman. The carman

(*d*) *Mitchell* v. *Crassweller*, 13 C. B. 237.

(*e*) 6 C. & P. 503.

(*f*) L. R., 8 C. P. 563.

not unloading the rails to the foreman's satisfaction, the foreman got into the cart and himself threw the rails out, and in so doing caused injury to a passing stranger. In this case it was contended that as the foreman was doing what was in nowise within the terms of his contract with his employer, he could not be said to be acting within the scope of his employment. It was held, however, that although he might have exceeded his strict duties, he was yet acting within the scope of his employment, and made his employer responsible.

In all cases the question would appear to be one of fact, as to whether the servant at the time he caused the injury was acting *entirely outside* his master's business, or was only, *whilst engaged in such business*, doing an act unnecessary for the master's service, and which had been expressly or impliedly forbidden by the master. In the former case he cannot make his master liable, in the latter he may do so.

It may be of assistance in deciding the question, as to whether the act causing the injury really was "*entirely outside*" the master's business, to discover the condition of mind or intention of the servant himself. Could the servant, although he might know that he had not been employed to do such act, or to do it in such manner, yet reasonably have thought that in so doing he was really acting for his master, and not for himself. If this were so, it is believed that it would be by no means an unimportant element in fixing the master with liability, although we do not assert that it would be of itself sufficient (*g*).

(*g*) See further, *Poulton* v. *The London and South-Western Rail. Co.*, 36 L. J., Q. B. 294; *Mitchell* v. *Crassweller*, 13 C. B. 237;

(c) *Was the injury unavoidable ?*

Where a master takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, he is not responsible because he may have omitted some possible precaution, which the event suggests he might have resorted to.

This rule, which limits the direct liability of a master, equally protects him if injury is caused through his servant not taking every possible precaution.

A master is not responsible for latent defects in machinery, not attributable to fault on the part of the manufacturer, and which could not have been discovered previously to the accident, for such cases are regarded as inevitable (*h*).

Likewise, if the injury was occasioned by the act of God, as through lightning or tempest, or by the King's enemies, it is regarded as inevitable accident, and the master is not liable. For an event to be, in the legal sense of the term, an act of God, it is not necessary that it should never have happened before, but it is sufficient that its happening could not reasonably have been anticipated (*i*).

(d) If the plaintiff was brought into contact with

Whatman v. *Pearson*, L. R., 3 C. P. 422, which case is somewhat irreconcilable with the others. *Whiteley* v. *Pepper*, 2 Q. B. Div. 276; *Rayner* v. *Mitchell*, 2 C. P. Div. 357; *Bayley* v. *The Manchester, Sheffield and Lincolnshire Rail. Co.*, L. R., 8 C. P. 148; 42 L. J., C. P. 78; and *Seymour* v. *Greenwood*, 6 H. & N. 359.

(*h*) *Readhead* v. *The Midland Rail. Co.*, L. R., 2 Q. B. 412; L. R., 4 Q. B. (Ex. Ch.) 379; *Richardson* v. *The Great Eastern Rail. Co.*, 1 C. P. Div. 342; *Stokes* v. *The Eastern Counties Rail. Co.*, 2 F. & F. 691.

(*i*) *The Nitro-Phosphate Chemical Manure Co.* v. *The London and St. Katherine Docks Co.*, 9 Ch. Div. 503; *Vaughan* v. *The Taff Vale Rail. Co.*, 5 H. & N. 679.

the source of his injury when he was engaged in no duty towards the defendant, and when at a place where he either had no business to be, or where he was to suit his own convenience, and with the mere permission of the defendant, he cannot recover if accidentally injured either by the defendant himself or his servants (*j*).

The latter principle is fully discussed in the case of *Southcote* v. *Stanley* (*k*), where the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held that he could not recover, Bramwell, B., intimating that if the plaintiff had been at the house upon business, or if he had been injured by anything in the nature of a trap, he could have recovered (*l*).

Upon the same ground did the plaintiff fail in the case of *Gautret* v. *Egerton* (*m*), where the defendant possessed land, with canals, cuttings and bridges across the same; which land and bridges were used, with his permission, by persons passing to the docks, and one of which bridges, being unsafe, occasioned the injury with respect to which the action was brought. Willes, J., in giving judgment for the defendant, says:—"The dedication by the defendant of his land was in the character of a gift. The principle of law as to gifts is that the giver is not responsible for damage from insecurity of the thing, unless he knew its evil character, and omitted to give notice of the same to the donee" (*n*).

(*j*) *Sullivan* v. *Waters*, Ir. C. L. R., 14 N. S. 460.

(*k*) 1 H. & N. 247.

(*l*) See, as to plaintiff coming to the premises upon business, case of *Indermaur* v. *Dames*, L. R., 1 C. P. 274; 2 C. P. (Ex. Ch.) 311; and *White* v. *France*, 2 C. P. Div. 308, and 46 L. J., C. P. 823.

(*m*) L. R., 2 C. P. 371.

(*n*) See *Bolch* v. *Smith*, 7 H. & N. 736; *Robertson* v. *Adamson*,

It is sometimes hard to distinguish the position of a mere licensee, from that of a person who is upon a particular place by virtue of an implied contract arising out of a special contract (*n*). For example, the visitors of a guest staying at an inn are not mere licensees upon the premises, but are there in the position of strangers, by virtue of the implied contract, arising out of the contract between the proprietor of the house and his own guest, and can therefore recover if injured through negligence (*o*).

A wilful trespasser cannot recover, for the law gives no compensation to wrong-doers (*p*).

The fact that the plaintiff was a licensee or a trespasser will not probably be often relied upon as a defence to an action under the Employers' Liability Act, as it will be *primâ facie* negatived by the very relationship of master and servant existing between the parties. Still, it may happen that a workman may be injured whilst in a place where he had no business to be, or in a place where his employment in nowise required him to be, although he might be there with his master's license. In such cases, the rules of law, which we have been considering, will apply to him equally with strangers.

Sc. Sess. Ca., 2nd Series, Vol. 24, p. 196; *Sullivan* v. *Waters*, Ir. C. L. R., 14 N. S. 460.

(*n*) *Smith* v. *London and St. Katherine Docks*, L. R., 3 C. P. 326.

(*o*) *Axford* v. *Prior*, 14 W. R. 611. See also *McMartin* v. *Hannay*, Sc. Sess. Ca., 3rd Series, Vol. 10, p. 411, decided upon this principle.

(*p*) But the accident must have been a probable result of his trespass. A person is not justified in setting traps, as spring guns, for the purpose of causing injury even to a wilful trespasser. *Ilott* v. *Wilkes*, 3 B. & A. 304.

(e) *Was the plaintiff guilty of contributory negligence?*

A master is not responsible if the conduct of the injured person was the proximate cause of the accident. (See post, Chapter VII. on "Contributory Negligence.")

---

2. IS THE PLAINTIFF A "WORKMAN?"

The plaintiff must be a workman within the meaning of the Act to become entitled to the benefits of it.

By section 8 of the Act (*q*), a workman is defined as "a railway servant, and any person to whom the Employers and Workmen Act, 1875, applies."

By section 10 of the Employers and Workmen Act (*r*), "the word 'workman' is not to include a domestic or menial servant, but save as aforesaid is to include any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under twenty-one years or not, has entered into, or works under, a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour."

The Act will thus be seen to include all classes of workmen engaged in manual labour, and probably includes railway servants who are not so engaged. The only exceptions are domestic and menial servants; *i. e.*, servants living in the master's house and employed in household duties, with regard to whom the former law still obtains.

With regard to domestic and menial servants, the master will be liable as heretofore, if through his own

(*q*) 43 & 44 Vict. c. 42. (*r*) 38 & 39 Vict. c. 90.

direct negligence they receive injury, or if he exposes them to dangerous risks (*r*).

Railway servants have been placed in a more advantageous position than other workmen; for, although with regard to them even the principle of the doctrine of "*common employment*" has not been abolished, yet railway companies will in the future be liable to their workmen for what are generally termed "railway accidents."

The railway clause was not exceptional legislation as to railways, but merely the application of the same general principle to some very important kinds of delegated authority (*s*).

The words of the sub-section (*t*) are:—

> "By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine or train upon a railway."

It is almost unnecessary to say that, in addition to the special advantage given to railway servants by this sub-section, all the other parts of the Act apply to them equally with workmen in other employments (*u*).

There appears to be nothing in the Act making it necessary that the railway servant should be employed in manual labour. In the definition section (*v*) of the Act he is not called a "*workman*," but a "*servant*." It was decided in an Irish case (*w*) that the general manager of a railway company was a fellow-workman with a workman employed in manual labour by the

(*r*) See *Warren* v. *Wildee*, W. N., C. P., 15th April, 1872.

(*s*) See Lord Selborne's speech in House of Lords, Hansard, vol. 250.

(*t*) Sect. 1, subs. 5.

(*u*) As the sub-sections 1, 2, 3, 4 of sect. 1.

(*v*) Sect. 8.

(*w*) *Conway* v. *The Belfast and Northern Counties Rail. Co.*, 11 Ir. R., C. L. 345.

same company, and that the doctrine of "*common employment*" extended to them; it may, therefore, by parity of reasoning, be argued that a general manager would now, under similar circumstances, be entitled to recover upon the very ground upon which he was formerly disqualified.

No definition is given in the Act of the words "*train*" or "*railway*." The inquiry has been already raised by a writer (*x*) as to whether a number of carriages without an engine can be regarded as a "*train?*" If the judges choose to construe the word "*train*" according to its common acceptation, they would of course answer this inquiry in the negative; but if the word is to be regarded strictly, there seems nothing to prevent a number of carriages attached to one another, but without an engine, being called a "train."

The author inclines to the belief that the word would be construed in this latter sense.

Another question which it is believed is more likely to occasion difficulty is this:—

What is a railway?

Can a private railway used at a colliery, or can a tramway be regarded as a "*railway?*" A private railway, it is believed, would be included, for there is nothing in the Act to show that the railway must be the property of a corporation.

It is thought, also, that a tramway would come within the definition of a "*railway;*" but the only case where the question would be likely to need decision would be where the injury was caused by the negligent management of the "*points*" upon the tramway.

(*x*) See Supplement to Mr. H. Smith's "Law of Negligence."

As a corollary to the main query now under consideration, viz. as to whether the plaintiff is a workman, arises this further question:—*Would a volunteer, who has given his assistance to workmen without the Employer's knowledge, be able to recover against the Employer if injured under such circumstances as, but for his being a volunteer, would have given to him a cause of action under the Act?*

We have before stated (*x*), that before the passing of the Act a volunteer became a fellow-servant with those workmen whom he assisted, and if he received injury at their hands could not recover against their Employer.

Although a person who, so far as the Employer is concerned, unsolicited intrudes himself into the employment, by so doing subjects himself to the disadvantages which the regularly-engaged workmen labour under, it does not at all follow that he must participate in their advantages also.

That a master should have liability thrust upon him, to make compensation to persons who do his work without his knowledge, or consent, or even in opposition to his express, or implied, commands, would seem too absurd.

Even though the assistance of the volunteer should have been craved, by a person exercising the Employer's delegated authority, the question would still have to be answered, whether his power could fairly be said to extend as far as to bind his Employer in this respect (*y*); a question, the answer to which would be mainly dependable upon the extent of the necessity which existed for the volunteer's assistance.

(*x*) See *ante*, p. 13. (*y*) *Wanstall* v. *Pooley*, 6 C. & F. 910.

The term "workman" in the Act does not include the workmen of the crown, or seamen (*z*).

---

3. WAS THE INJURY CAUSED BY A FELLOW-SERVANT FOR WHOSE NEGLIGENCE THE EMPLOYER IS NOW LIABLE?

As to who are fellow-workmen, space forbids the enlargement upon what has been already stated with reference thereto (*a*).

Before coming to a conclusion upon this point, it is necessary to scrutinize closely the language of the sub-sections 2, 3, and 4 of section 1. All of these relate to injury caused by workmen delegated with authority, either general or special, by the common Employer.

The words are—

Sect. 1, subs. 2. "By reason of the negligence of any person in the service of the Employer who has *any* (*b*) superintendence entrusted to him, whilst in the exercise of such superintendence."

Section 8 defines the expression "*person who has superintendence entrusted to him*," as "one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

Subs. 3. "By reason of the negligence of any person in the service of the Employer, to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where

(*z*) An action already brought in a county court under the Act has proved futile, it being shown that the plaintiff was included as a "seaman" in the definition given by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 2).

(*a*) See *ante*, pp. 9—13.

(*b*) This word "any" appears to be superfluous, and is certainly misleading.

such injury resulted from his having so conformed."

Subs. 4. "By reason of the act or omission of any person in the service of the Employer, done or made, in obedience to the rules, or bye-laws of the Employer, or in obedience to particular instructions, given by any person delegated with the authority of the Employer in that behalf" (*c*).

The above sub-sections form the chief inroad made by the Act upon the "*doctrine of common employment.*" It is believed that upon careful consideration they will be found by no means fully to justify the apprehension that the Act has occasioned to Employers, nor, on the other hand, the expectations which, it is to be feared, have been based thereupon by workmen and their advisers.

The sub-sections, although the wording is vague, were, it is considered, intended to meet the cases respectively of a general superintendent, a special superintendent, and a person who, without being a superintendent at all, is on some particular occasion entrusted with particular instructions directly, or indirectly, by his Employer (*d*).

Each of the sub-sections, moreover, contains to some extent by implication what belongs to the others. Thus, the "*person*" mentioned in subsect. 3, "to whose orders or directions the workman at the time of the injury was bound to conform," may be a general superintendent

(*c*) Injury resulting from defective byelaws is treated of hereafter, see *post*, pp. 51—54.

(*d*) The words of the sub-section (ss. 4) do not expressly say that the "particular instructions" must emanate from the Employer himself, but the intention appears to us to be so (see *post*, pp. 43—45).

under subsect. 2; or, again, the general superintendent in subsect. 2, may be the "*person*" mentioned in subsect. 4, and may be either the person delegating, or delegated with the particular instructions of the Employer; or again, the person exercising special superintendence under subsect. 3, may be so empowered by particular instructions delegated to him through the Employer as in subsect. 4.

Regarding the three above subsections more particularly in order, it will be seen, that the first (*e*), limited as it is by section 8, makes the Employer liable for the negligence of *a servant whose chief duties are, by the terms of his contract with his Employer, those of superintendence.*

But, even in this case, the injury must have been caused by such superintendent "*whilst in the exercise of superintendence.*" This means that he must either have done some act of superintendence negligently, which it was his duty to do properly, or omitted to do some act of superintendence which it was his duty to do, and the injury must have resulted from such negligent act or omission.

The servant exercising superintendence *must not be employed in manual labour* (*f*); consequently, a working foreman or overseer would not by his negligence make his Employer liable under this subsection.

The "*duty of superintendence*" referred to evidently means a duty which gives some authority, or power of command, to the servant exercising it over the whole or some part of his fellow-workmen, and in this sense alone will the phrase, it is believed, be interpreted.

(*e*) Sub-sect. 2. (*f*) Sect. 8.

It follows that, although a workman may have superintendence, in the sense of being entrusted with the management of plant or machinery, yet he is not a superintendent within the meaning of the section. For if he takes a part in the management of such plant or machinery, with his own hands, he is not a general superintendent as he is engaged in manual labour; if he does not take such a part, then his duties of superintendence are necessarily those of command over at least some part of his fellow-workmen.

Again, it may sometimes happen that a person with superintendence may cause injury, by negligently doing some act *himself*, instead of simply *directing* it to be done. By reason of this he would not cease to be a superintendent within the meaning of sect. 8, the words of which section only require that he should not be "*ordinarily* engaged in manual labour;" but, it might well be contended, that the injury was not caused "*whilst in the exercise of his superintendence*" (*g*). If a person with superintendence should, contrary to the terms of his employment, take upon himself to perform manual labour, it could be argued with some force that he had thus placed himself outside the words of the Act, and must be considered as a fellow-workman with any other workman injured through his negligence whilst so employed.

It is believed that in such a case it would require a liberal construction of the Act to fix the Employer with liability.

Upon the same sub-section (sub-sect. 2) arises another question which will probably need judicial determi-

(*g*) Sect. 1, sub-sect. 2.

nation. The words are:—"*the negligence of any person having any superintendence entrusted to him whilst in the exercise of such superintendence.*"

Does this mean that the injury must have been occasioned by such superintendent, to a workman *over whom he exercises superintendence*, or, is the Employer liable if it is occasioned to *any* workman in the same employment?

The author inclines to the latter opinion and for the following reason. If the superintendent and the particular workman injured, were so far connected with one another in the employment, that the risk would have been, before the passing of the Act, regarded as a risk incidental to the service, it is believed to have been the intention of the legislature to absolve workmen from taking as a risk incidental to their service, the negligence of such a superintendent; if the risk would not, before the Act, have been a risk incidental to the service, the workman can recover now as he could then (*h*).

In the next sub-section under consideration (sub-sect. 3), where what we have termed "*a special superintendent*" is alluded to, the legislature appears to have contemplated the event of injury resulting *to those workmen who have to conform to the special superintendence*, and to them only.

The words of this sub-section (*i*) are:—

> "The negligence of any person to whose orders or directions the workman at the time of the injury

(*h*) See *ante*, pp. 6—8.

(*i*) Sect. 1, sub-sect. 3.

was bound to conform, and did conform, where such injury resulted from his having so conformed."

It is believed probable that the interpretation of this sub-section may occasion more difficulty than any other part of the Act.

The words, as before stated, are thought to provide for *special superintendence*, and to refer to any workman who, at the time of the injury, is in temporary command, although his usual duties are those of manual labour; or, to the very usual case of a workman who, whilst engaged in manual labour himself, has one or more assistant workmen under him, and subject to his orders.

It is feared that the question will often arise as to whether the workman was justified in giving the order, in the carrying out of which the injury was occasioned; for the Employer, it will be observed, is only made liable for injury resulting from such orders as the workman was *bound* to conform to. If the order was altogether *ultra vires* on the part of the person giving it, and the servant knowing this, yet choose to conform to it, and in so doing received injury, he could not, probably, hold the Employer liable under this sub-section.

Although the words of the sub-section do not expressly say that the injury must result *to the person himself who conforms to the orders*, yet, taken as a whole, it would be difficult to put any other construction upon them.

If our supposition in this respect is correct, there is a peculiar distinction between the Employer's liability for the negligence of the "*general superintendent*," referred

to in sub-sect. 2, as opposed to that of the "*special superintendent*," referred to in sub-sect. 3, which may be seen from the following illustration.

A., a servant, with *general* duties of superintendence over the workmen employed in one department of a factory, orders one of the workmen under his command to lower a bale of goods out of the window by a chain which was not provided for such purpose, and which was of clearly insufficient strength to bear the weight. The bale of goods falls, and injures a workman employed in the same factory, but one over whom A. exercises no superintendence. In this case, according to our opinion, the Employer is liable. Let us next assume that A., who has given the same negligent order, is usually engaged in manual labour, and is only temporarily entrusted with authority over the workman who executes the order. In this case A. is a "*special superintendent*" under sub-sect. 3, and according to the construction which we have put upon the words thereof the Employer would not be responsible; for, although the injury was, as in the former case, occasioned by A.'s negligent order, and although it was occasioned to a workman in the service of the common Employer, yet the injured servant himself was never subject to A.'s orders or directions.

The injury must have happened to the workman under sub-sect. 3, *in consequence of obeying* the servant having authority over him; in other words, it must have been a direct and natural result of his "having so conformed" (*j*).

(*j*) A servant, however, is not bound to obey an order, the execution of which is clearly attended with danger to himself. Addison on Torts, 4th ed. 397. But where a servant has con-

There may be doubts whether it is indispensable that the accident should happen to the workman at or near the time when he is actually conforming to the order; or whether it is sufficient that it should happen to him at any subsequent time, so long as it was occasioned by such conforming.

For example:—A., a workman, is ordered by B., a person to whose orders he was bound to conform, but who was not a "general superintendent" under sub-sect. 2, to stack certain goods in such a way that there is a danger of them falling. If they should fall and injure A. whilst he is engaged in stacking them, the Employer's liability under this sub-section (sub-sect. 3) is clear; but suppose that A., whose ordinary duties compel him to work in the immediate vicinity, should be injured by their falling after a considerable lapse of time, then, although the goods have fallen directly through A.'s conformity with B.'s order, it would be difficult to say that the injury resulted from his having so conformed.

This reasoning appears to be strengthened by the fact that the Employer's liability, in such a case, would be dependent upon two contingencies; first, the accident happening to the particular workman himself who erected the stack; and secondly, such workman being, at the time of the accident, subject to the control of the same person who gave him orders to erect it.

With reference to the same illustration, it seems clear that if any other servant than A. should be injured by the goods falling, either at the time they were being

tracted to do dangerous work there are cases in which he could not legally refuse to carry out his contract.

stacked, or at any subsequent time, the Employer would not be responsible.

Let us next consider sub-sect. 4, the last of the three sub-sections under consideration.

The words of this sub-section, omitting that part which relates to defective bye-laws, are :—

> "By reason of the act or omission of any person in the service of the Employer, done or made, in obedience to particular instructions given by any person delegated with the authority of the Employer in that behalf."

It is noteworthy that the word "*negligence*" is not used in this sub-section, but in a subsequent section (*k*) it is declared, that the workman is not entitled to compensation under this sub-section, "unless the injury resulted from *some impropriety or defect*, in the particular instructions therein mentioned."

This amounts in effect to saying, that the *particular instructions* must have been in themselves *negligent instructions*.

The above words might, at first sight, appear to be comprehensive, and to cover any case, where a workman, who has received particular instructions from *any* person who is expressly or impliedly empowered to give him instructions, conforms thereto, and by such conformity occasions injury. If this be so then sub-sect. 3, which we have discussed, would appear to be wholly unnecessary, for this sub-section (sub-sect. 4) would not only cover every case therein included, but would extend the liability of the Employer to the case of any servant injured through the negligence of the "special superintendent" alluded to in sub-sect. 3, whether such servant was or was not bound at the time of the injury, or

(*k*) Sect. 2, sub-sect. 2.

at *any* time, to conform to his orders or directions, and whether or not the injury resulted from his having so conformed. The question which will have to be decided upon this sub-section is this. Is it immaterial whether the particular instructions are framed by the Employer personally, or by the person to whom he has delegated the authority to give them?

It may be that the words "*in that behalf*" at the end of the sub-section control the whole sense thereof; and that the person who is delegated with the authority of the Employer, must be delegated to give *those particular instructions.*

If this should be so, then the words only relate to the case of particular instructions being given by the Employer himself, or by a person to whom he has delegated his authority to give them—in each case the particular instructions emanating from the Employer—to a servant to do, or omit to do, something, the effect of such act, or omission, being the injury sustained.

Assuming this to be so, and that the negligent command to do or omit to do some act must proceed in the first place from the Employer himself, it may well be questioned whether his liability at common law is extended by the sub-section at all. As we have before stated (*l*), an Employer has always been liable for his own personal negligence causing harm to his servants (*m*), and the mere fact of his negligent instructions being conveyed to the person who has to fulfil them, through another person, delegated to give them, would not make them the less the Employer's instructions.

If this construction is not so, and if the words do not

(*l*) See *ante*, p. 4.

(*m*) See judgment of Byles, J., in *Fowler* v. *Lock*, L. R., 7 C. P. 281; *Warren* v. *Wildee*, W. N., C. P. 15th April, 1872.

mean that the instructions must have been specified by the Employer himself, but by any person to whom he may have deputed a general power to give specific instructions, then one at all events of the preceding sub-sections (sect. 2 or sect. 3) appear to be useless.

Of course it is possible that the framers of the Act meant to express an intention other than the above in the sub-section under consideration.

The only alternative construction which appears to us capable of being put upon the words would be that they were intended to meet a case where the Employer gives authority to a workman who is not entrusted with superintendence, either general or special, to lay down *verbal* rules for the due carrying on of the work. These rules are made defectively or improperly (*n*) and occasion injury; but the Employer himself took no part in their making, nor did he sanction them. Still it might be said that the words of the subsection are wide enough to cover such a case and to make the Employer responsible.

Even should this be so, it is very doubtful whether the words were required, for in addition to the fact that injury resulting from defective rules is specially mentioned in the same sub-section, and there is nothing to limit the word "rules" to written or printed rules. Employers have more than once been held responsible for carrying on their business under a defective system, or with defective rules (*o*).

Briefly endeavouring to sum up the effect of the sub-sections which we have been considering, we may say

(*n*) Sect. 2, sub-sect. 2. (*o*) See *post*, p. 52.

that, in either of the following events an Employer is debarred from making use of the defence of "*common employment*:"—if his workman whose general duties are confined to those of superintendence, performs those duties negligently and thus occasions injury to *any* workman in the common employment; if his workman, no matter what may be his general duties, who has power to give orders to certain of his fellow-workmen, gives negligent orders in the carrying out of which by the workman to whom they were given, such workman receives injury, or, if the Employer himself, either by himself or by another, gives improper or defective special instructions framed by himself, or possibly by another, in the carrying out of which injury is occasioned to any workman in the common employment.

---

4. WAS THE INJURY CAUSED BY DEFECTIVE WAYS, WORKS, MACHINERY OR PLANT?

The words of this sub-section (sect. 1, sub-sect. 1) are:—

> "By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer."

These words again are limited by another section (sect. 2, sub-sect. 1), where it is stated that the employer is not to be liable under this sub-section "unless the defect therein mentioned arose from or had not been discovered or remedied owing to his negligence, or that of some person in his service, entrusted by him with the duty of seeing that the ways, works, machinery or plant, were in proper condition."

In the first place it is necessary to discover how far these words extend the Employer's common law liability.

Duty is imposed upon every Employer by common law to use ordinary care and diligence to provide sound and safe materials, and accommodations for his servants (*p*), unless by the terms of the contract between the parties the servant has absolved his Employer from this obligation (*q*). Neither by common law, nor the present Act, is the master made an insurer of his servant's safety. He is not bound to adopt all new improvements (*r*), so long as he furnishes such plant, and machinery, as a reasonable man, having taken reasonable precautions, might reasonably expect to be capable of acting efficiently and safely (*s*).

In the case of *Williams* v. *Clough* (*t*), it was decided that an Employer could be held responsible for injury caused to a servant through using a defective ladder, the allegation of the declaration being that the defendant well knew that the ladder was unsafe.

In the case of *Brydon* v. *Stewart* (*u*), an Employer was held responsible to the representatives of one of his workmen, who had been killed by a stone falling upon him from the side of a pit, which stone had been left there by the defendant's personal fault. In his judgment Lord Cranworth remarked that both by the law of England and of Scotland a master incurs responsibility in respect of an injury occasioned by a defect of machinery (*v*).

(*p*) *Brydon* v. *Stewart*, 2 Macq. H. L. 30; *Paterson* v. *Wallace*, 1 Macq. H. L. 748; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. 306.

(*q*) *Seymour* v. *Maddox*, 16 Q. B. 326; *Brookes* v. *Courtenay*, 20 L. T. (N. S.) Q. B. 440.

(*r*) *Hanson* v. *The Lancashire and Yorkshire Rail. Co.*, 20 W. R. 297.

(*s*) See judgment of Lord Cairns in *Wilson* v. *Merry*, L. R., 1 H. L. (Sc.) 332.

(*t*) 3 H. & N. 258.

(*u*) 2 Macq. H. L. 30.

(*v*) An exactly similar case was that of *Mellors* v. *Shaw*, 1 B. & S.

In a more recent case, *Murphy* v. *Phillips* (*w*), an Employer was held responsible to his workman for the breaking of a chain, caused partly by wear and tear, and partly by bad welding, Cleasby, B., saying:—"There was an obligation on the master to see that the chain was not dangerous. He might have done this in two ways: he might have engaged a man expressly to attend to these matters, in which case he would himself have been free from liability; or he might have seen to these matters himself."

Likewise, in *Weems* v. *Mathieson* (*x*) the Employer was held responsible for injury causing the death of his workman through the falling of a cylinder insufficiently suspended, the manner of the suspension having been suggested by the defendant himself.

In an American case, *Cayzer* v. *Taylor* (*y*), a master was held responsible for defective machinery, although the negligence of a fellow-workman of the workman injured contributed to the accident.

In this case, as in all those before mentioned, there was an allegation that an Employer knew that the machinery was defective.

But if an Employer for economical or other motives chose to employ plant, or machinery, which was defective, or even dangerous, he was not responsible for injury happening therefrom, if the workman knew of the defect and yet elected to enter into, or continue in the employment; for, as we have stated, he was presumed by such election to have absolved his Employer from his com-

437, decided expressly upon the ground that the master's *personal* negligence caused the injury. *Roberts* v. *Smith*, 2 H. & N. 213.

(*w*) 35 L. T. 477; 24 W. R. 647.

(*x*) 4 Macq. H. L. 215.

(*y*) 76 Massa. (10 Gray) 274.

mon law liability, and to have taken the risk as one incidental to his service.

"It may be inhuman for an Employer to carry on his works so as to expose his workmen to the peril of their lives; but it does not create a right of action for an injury which it may occasion where the workman has known all the facts, and is as well acquainted as the master with the machinery and voluntarily uses it" (*z*).

The rule holds good even if the Employer has omitted a precaution imposed upon him by statute to secure the safety of his workmen, if the workman injured knew of the omission (*a*).

But if the workman, knowing of the defect, complained to the Employer, and the Employer, either by an express promise to have it remedied, or by leading the servant naturally to expect that it should be remedied, induced the servant to remain in his employ, he became liable if he received injury therefrom (*b*).

Is the effect of this section of the Employers' Liability Act absolutely to forbid an express contract between Employer and workman by which the latter agrees to work with defective machinery, or accommodations; or to declare that no implied contract arises from the workman continuing in the employment after knowledge of such defects? We think not. If, as is hereafter stated (*c*), it is open to workmen, by special contract, to

(*z*) Judgment of Bramwell, B., in *Dynne* v. *Leach*, 26 L. J., Ex. 231. And see *Assop* v. *Yates*, 2 H. & N. 768; *Smith* v. *Dowell*, 3 F. & F. 238; *Griffiths* v. *Gidlow*, 3 H. & N. 648; also judgment of Erle, J., in *Seymour* v. *Maddox*, 16 Q. B. 332.

(*a*) *Senior* v. *Ward*, 1 E. & E. 385.

(*b*) *Holmes* v. *Clarke*, 6 H. & N. 349; 30 L. J., Ex. 135; 7 H. & N. 937; *Holmes* v. *Worthington*, 2 F. & F. 533.

(*c*) See *post*, p. 59.

contract themselves out of the whole Act, *à fortiori* must it be open to them, in like way, to exclude themselves from the benefit of one section of it. And, although the courts may be loath to *imply* such a contract, where it appears that the only alternative offered to the workman to working with defective machinery, &c. is the giving up his means of livelihood; yet it seems to us that they could have no option but do so, if the Employer, upon notice, refuses to remedy, and places the above alternatives distinctly before his workman.

The sum of the preceding remarks then amounts to this:—that with respect to the Employer's *personal* liability with regard to injury resulting from defects in the ways, works, machinery or plant, of which he was aware, or of which, having regard to the part he took in the management thereof, he ought to have been aware, the Act has made no alteration whatever.

The real extension of liability is effected by the latter part of the first sub-section of sect. 2, making the Employer responsible if he deputes his own liability to see to the condition of his ways, works, machinery or plant to another.

Before the Act the Employer entirely got rid of his own liability by entrusting this duty to a workman selected to perform it, so long as he was not incompetent to the Employer's knowledge (*d*).

The Employer will therefore from henceforth be responsible for the negligence as well as the incompetence of the person to whom he has entrusted the duty of

(*d*) Judgment of Cleasby, J., *ante*, p. 48; *Balleny* v. *Cree*, Sess. Ca. 3rd ser. vol. ii. p. 626, and the remarks of the Lord Justice Clerk therein.

seeing that the ways, works, machinery or plant are in proper condition.

It is noticeable that the Act speaks of "ways, works, machinery or plant, *connected with* or used in the business of the Employer." These words "*connected with*" will prevent any cavil as to the injury having or not been caused by *the use* of the "ways, works, machinery or plant," in the course of the employment.

As to what may be included within the words "ways, works, machinery and plant," we can but say that they will probably be interpreted liberally. The legal definition of a "*way*" is, a road for passengers. "*Plant*," is defined as, "the fixtures, tools, machinery and apparatus necessary to carry on a trade or business." The words "*works*" and "*machinery*" speak for themselves, and the latter appears to have been unnecessary, being included in the word "*plant*."

---

5. WAS THE INJURY CAUSED BY DEFECTIVE RULES?

The words of the Act (sect. 1, subsect. 4) are:—

> "By reason of the act or omission of any person in the service of the Employer, done or made in obedience to the rules, or byelaws of the Employer."

Limited again by sect. 2, subsect. 2, which says that the Employer is not to be held responsible:—

> "Unless the injury resulted from some impropriety or defect in the rules or byelaws mentioned, provided that where a rule or byelaw has been approved, or has been accepted as a proper rule or byelaw by one of her Majesty's principal

> Secretaries of State, or by the Board of Trade, or by any other department of the government, under or by virtue of any act of parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw."

The effect of these sections is to declare the Employer liable for injury caused by the conforming to defective byelaws, either to that workman conforming, or by him to any other workman in the employment. An Employer has been held liable at common law for carrying on his business with defective rules (*e*). The Act therefore appears to have curtailed, rather than extended, the Employer's common law liability in this respect; for, hereafter, a workman will only recover under this head, where it appears, not only that the byelaws were improper or defective, and that the injury was caused by conformity to them, but also that they were unsanctioned.

By 3 & 4 Vict. c. 97, ss. 7, 8, byelaws made by railway companies, either before or after the passing of the Act, are to be sanctioned by the Board of Trade. The principal secretaries of state had power to sanction byelaws in factories under 27 & 28 Vict. c. 48, s. 5; and although this Act is now repealed by the Factory Act, 1878 (41 Vict. c. 16), the validity of the rules made under the former Act and duly approved is preserved (sect. 107).

A similar power is given by the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 53, and by the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

Power is also given to the Board of Trade and the

(*e*) *Voss* v. *Lancashire and Yorkshire Rail. Co.*, 2 H. & N. 728; 27 L. J., Exch. 249.

secretaries of state, under the Explosives Act, 1875 (38 Vict. c. 17), ss. 35, 36, to sanction rules made to meet the requirements of that Act, by railway or canal companies, or wharfingers; and, under the Alkali Act, 1863, the Board of Trade (now the Local Government Board) can sanction rules, made by the Employer, for regulating the conduct of those engaged in the dangerous parts of the work (*f*).

Another defence is open to the Employer under this, as under the former sub-sections, viz., that the workman knew of the defect which caused his injury, and failed to give notice thereof (*g*).

This will probably be the Employer's usual defence to an action for injury caused by defective byelaws.

He, or his advocate, will doubtless say, "Assuming the byelaw to be defective, the workman knew of the byelaw—he probably met with his injury whilst obeying it; the byelaw was one regulating the especial work with which he was conversant, and he had at all events equal opportunities with, if not greater than, any other person of knowing whether it was defective, and he omitted to complain of it."

Of course, if the Employer himself made the byelaws, or if he takes an active part in the management of the business, it may be said, on the other hand, "You, the Employer, who made these byelaws, or who allowed them to be made to regulate the business with which you were intimately acquainted, ought to have known of any defects in them; at all events, I, the workman, was justified in assuming that you did know."

(*f*) See, for further information on this subject, Lumley on Byelaws.

(*g*) Sect. 2, sub-sect 3, and see *post*, Chapter VII. on Contributory Negligence.

But if the Employer had deputed the making of the byelaws to another, or if he was not himself practically acquainted with the business, he could not be fixed with such implied knowledge, and where the workman had not given notice, it would be absolutely necessary for him to show *affirmatively*, that the Employer knew that the particular byelaw from which the injury resulted was a defective one (*h*).

The result, which it is suggested should be drawn from the foregoing, is this:—That, unless in a case where the byelaws are unsanctioned, and where the workman has given express notice of the defect, and yet the byelaw has not been amended, the greatest caution should be exercised before an action is commenced for injury resulting from defective rules or byelaws.

(*h*) The workman may in this, as in other cases, rely upon the fact that he has given notice to a person superior to himself in the employment; but unless such person either made the byelaws or had the duty of enforcing them we think such notice could not bind the Employer.

CHAPTER IV.

AS TO WHETHER THE CAUSE OF ACTION REMAINS.

LET it now be assumed that the circumstances of a particular case are such that they show, at all events, a *primâ facie* cause of action under one of the heads of liability, which have been explained in the last Chapter.

It then becomes the duty of the professional adviser to see whether such cause of action still exists, so that it can be prosecuted.

His first enquiry should be this:—

---

1. IS THE PLAINTIFF IN TIME?

Upon this point the words of the Act are quite clear (*a*). The notice of the fact of the injury must be given to the Employer, or if there is more than one Employer, to *one* of the Employers, within six weeks from the time the injury was sustained (*b*); and if given by registered letter, as it may be, shall be deemed to have been given at the time when the letter in the ordinary course of post would have been delivered (*c*). This is most important to be borne in mind, for if the six weeks should expire, and the notice not have been given, the right of action is gone entirely, unless in the improbable event of death afterwards resulting from the acci-

(*a*) Sect. 4. (*b*) Ibid. See Appendix A. 11. (*c*) Sect. 7.

dent, for no power is given to the judge to excuse the plaintiff's laches in this respect.

If the injury is not a fatal one the action must be commenced within six months (*m*) from the occurrence of the accident causing the injury (*n*). If the injury results in death the action must be commenced within twelve calendar months from the time of death (*o*). It should be remembered that, although a full year is allowed from the time of death for commencing the action, the Act, as in non-fatal cases, requires that notice of the injury should have been given within six weeks from the time of its happening.

The fact that the section (sect. 4) declares that the omission to give such notice, in a case where death has resulted, shall be no bar to the maintenance of the action if the judge shall be of opinion that there was reasonable excuse for not giving it, will be, in the majority of cases, of no moment. For, undoubtedly, this saving clause is not intended to mean that mere forgetfulness to give the notice within the prescribed time will be remedied, for there would be no more reason that this negligence should be condoned in a fatal than in a non-fatal case; but it is, we think, meant to meet either a case where the relatives entitled to bring the action do not hear of the death within reasonably sufficient time, or perhaps where the injury is at first thought to be so trivial that an action for compensation is not contemplated and yet afterwards it is found to have caused death (*p*).

(*m*) The word "month" used in an act of parliament means a *calendar* month. See 13 & 14 Vict. c. 21, s. 4.

(*n*) An action is commenced in the County Court at the date the "plaint" is entered.

(*o*) Sect. 4.

(*p*) See as to reasonable excuse, Appendix A. 10, note.

In cases of fatal accidents the *onus* of showing reasonable excuse for not having given notice in proper time will rest upon the plaintiff.

---

2. HAS THE PLAINTIFF GIVEN PROPER NOTICE?

Section 7 of the Act requires that the notice of injury contains the name and address of the workman injured, the cause of the injury stated in ordinary language, and the date at which it was sustained.

The notice may be in the form given in Appendix C., or in any other form which contains the above requirements (*p*).

The effect of the latter part of the section (*q*) is that no informality in the notice is to make it invalid unless the effect of such informality has, in the opinion of the judge, been to prejudice the defendant in his defence, *and* unless he believes that such informality was for the purpose of misleading. The word "*and*" here would appear to show that a notice is only to be invalid when it is *defective and fraudulent*, and never upon the ground alone that it is defective (*r*). But if a defendant should be prejudiced by an informality in the notice, innocently committed, although the notice would no doubt be remedied and the action thus preserved, the plaintiff would have to remedy his mistake as far as possible by submitting to an adjournment, and the payment of any costs occasioned to the defendant by the informality.

(*p*) The notice should not be in the form of a letter (*Mason* v. *The Birkenhead Improvement Commissioners*, 29 L. J., Exch. 407), although for the purposes of this act such a notice would probably not be bad.

(*q*) Sect. 7.

(*r*) See, however, Appendix A. 7.

The notice may be served in either of the following ways:—

1. By delivering it at the residence or place of business of the person on whom it is to be served; or, if the person on whom it is to be served is a company or a partnership, by delivering it at their office, or at one of their offices.

2. By post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence, or place of business; or, if the person on whom it is to be served is a partnership or a company, by a registered letter addressed to their office, or one of their offices (*r*).

The *onus* of showing that the statutory requirements were fulfilled, and that the defendant had notice of the injury, rests upon the plaintiff; but as soon as he proves that the letter containing the same was properly addressed and registered, the *onus* of showing that he did not receive it is shifted to the defendant (*s*).

---

3. HAS THE PLAINTIFF CONTRACTED AWAY HIS RIGHT OF ACTION?

In all cases before an action is commenced under the Employers' Liability Act, enquiry should be carefully made to ascertain whether the workman injured has, either before the time the injury was received, contracted with his Employer that the operation of the Act should be excluded from his contract of service, or has, since the time of the injury, accepted, or agreed to accept,

(*r*) This is the effect of sect. 7. (*s*) See Appendix A. 3.

some compensation. It is quite clear that it is open to him to do either the one or the other (*t*). If it appears *primâ facie* that the workman has contracted himself outside the Act, the terms of the contract should be looked at, with a view of seeing whether such contract is a binding one. With this object, it must be first ascertained that the consideration upon which the contract is founded is a *valuable* consideration. The mere fact of the Employer asking his workman to waive the Act, and the workman acquiescing, is no binding contract, for in such case there is no consideration at all for the workman's promise; but it is different where the Employer says:—"You only stay in my service on condition that you contract yourself out of the Act," or, where in substitution for the benefits of the Act, an insurance fund is raised, with the consent of the workman, to which the Employer contributes.

If the contract is in writing, care should be taken to see that the consideration inserted therein is the real consideration for the workman's promise, and that it has been executed (*u*).

If the workman, after the injury, agrees to accept any compensation in the place of the right of action arising through the injury, then, although such compensation may not be one hundredth part of the value of his loss, he cannot afterwards sue, nor, if death should subsequently result from the injury, can his personal representatives (*x*).

(*t*) See the answer of the Attorney-General to Mr. Mac Donald as to workmen contracting themselves out of the act. Hans. 3rd Series, Vol. 258, p. 157, Jan. 7, 1881; see also Addison on Torts, 5th ed. p. 46.

(*u*) *Oldershaw* v. *King*, 2 H. & N. 517.

(*x*) Addison on Torts, 5th ed. p. 46.

For the compensation accepted by the workman to be an absolute bar to his right to sue, it is not necessary that he should have known the full extent of the injury he had received, but, if he should be induced to compromise by false representations as to the nature thereof, made by, or on behalf of, the Employer, he will not be bound by having accepted such compensation (*y*). Further, he will never be estopped by the mere fact of giving a receipt in "full satisfaction and discharge" of his claim, if he can show, either that he was imposed upon, or that he was not aware of the import and effect of the receipt at the time he signed it (*z*).

(*y*) *Stewart* v. *The Great Western Rail. Co.*, 2 De G., J. & S. 319.

(*z*) *Lee* v. *The Lancashire and Yorkshire Rail. Co.*, L. R., 6 Ch. 527.

CHAPTER V.

THE PROCEDURE IN AN ORDINARY ACTION UNDER THE ACT.

We now proceed upon the assumption that it has been ascertained with sufficient certainty that an injury has given rise to a cause of action under the Act, which cause of action still exists.

The first enquiry of necessity is—

---

1. Who are the proper parties to the action? As a general rule, of course, the workman injured will himself be plaintiff, and the Employer, in whose service the injury was sustained, will be defendant. Where, however, the workman is an infant (*a*), or where the injury has had a fatal termination, this will not be so.

An infant plaintiff must sue by his next friend. The mode provided by the County Court Rules, 1875 (*b*), is for the next friend to attend at the office of the registrar of the court, at the time of entering the plaint, and to undertake the liability of the costs of the action (*c*).

Such undertaking is to be filed by the registrar, and the action then proceeds in the name of the infant, by such next friend.

The question whether an infant could be made responsible as an Employer, under the Employers' Liability Act, is one which presents considerable difficulty.

(*a*) An infant may sue, for he is included in the term "workman." See 38 & 39 Vict. c. 90, s. 10.

(*b*) Ord. IV. r. 9, and Ord. V. r. 7.

(*c*) See Appendix A. 8.

This question is a practical one which may require solving any day, and having regard to the fact that there are numerous Employers of labour who are infants in contemplation of the law, it will, no doubt, soon be decided by judicial authority.

After much consideration we have come to the conclusion that the Employers' Liability Act does not impose any *fresh* responsibility on such infant Employers.

An infant is generally liable for torts, although he cannot be sued for a wrong where the cause of action is in substance *ex contractû*, or so directly connected with the contract that the action would be an indirect way of enforcing the contract. "If the infant's wrongful act, though concerned with the subject-matter of the contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract, in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable" (*c*). . . . "A man who has made a contract with an infant cannot convert anything that arises out of that contract into a tort, and seek to enforce the contract through the medium of an action for tort" (*d*).

This distinction was illustrated in the case of *Burnard* v. *Haggis* (*e*), where an undergraduate who hired a mare for a ride, and was expressly told that she was not fit for leaping, yet allowed his companion to use the mare for this very forbidden purpose, whereby the mare was injured and ultimately died. It was held that the infant was guilty of an actionable tort independent of

(*c*) Pollock on Contracts, 2nd ed. 55.

(*d*) Addison on Torts, 5th ed. 106.

(*e*) 14 C. B., N. S. 45.

the contract, if contract there was, and was therefore liable.

It has recently been held by the Court of Appeal (*f*) that an infant cannot be made a bankrupt, for the reason that he cannot be a "trader."

There appears, however, to us to be no legal reason that an infant Employer who, by his *personal* negligence, causes injury to one of his workmen should escape responsibility by reason of his infancy. For, if there was no legal contract between the Employer and workman, the Employer would be liable to him as though he were a stranger, and although but for the agreement under which the workman worked, there would probably have been no opportunity of committing the tort, it nevertheless appears to us to be perfectly independent of the agreement.

But if an infant Employer is liable for *personal* negligence he was liable for it before the passing of the Employers' Liability Act, and the only further liability which the Act could impose upon him would be a liability for the negligence of his managers, or those to whom he has entrusted some authority.

As before stated we do not think he incurs this further liability, for although the fact of the person injured being his workman may be of no importance, it appears to us impossible to hold him liable for the torts of one whose only connection with him is an agreement as to which he has a perfect right to say, "So far as I am concerned this is no agreement at all."

In other words, we think this would be one of the cases where it would be impossible to enforce the tort without recognizing the validity of the contract.

(*f*) *In re Jones*, 50 L. J., Ch. 673.

Where it is wished to make an infant Employer liable for *personal* negligence—and this need not be an action under the Employers' Liability Act—the summons is issued against him personally, but on the return day he may appear and name a person willing to act as his guardian *ad litem*, but if he do not name a guardian the judge may appoint any person in court willing to become guardian, or in default the registrar of the court; but no liability for costs is incurred by the person appointed guardian by the court (*g*).

If the proposed plaintiff should be a married woman (*h*) she must sue by her next friend, unless she satisfies the registrar as to payment of the costs of the action, and obtains leave from him to sue alone (*i*).

If the Employer should be a married woman carrying on a separate business under the Married Women's Property Act, 1870 (*k*), or after judicial separation, or by the custom of the city of London, it would appear that the correct way is to join her husband as co-defendant, leaving her to apply to the registrar under the County Court rules (*l*) for leave to defend alone, which leave will be granted on such terms as to security for costs as the registrar may think right.

In any case, where a married woman has obtained a protection order for her property under the Act in that behalf (*m*), she is in the position of a *feme sole*, and could sue (*n*), and, it is thought, be sued under the Employers' Liability Act in her own name.

(*g*) Ord. XVI. r. 9.

(*h*) The term "workman" will include a woman. 13 & 14 Vict. c. 21, s. 4.

(*i*) Ord. V. r. 7.

(*k*) 33 & 34 Vict. c. 93, s. 1.

(*l*) Ord. V. r. 7.

(*m*) 20 & 21 Vict. c. 85, s. 21.

(*n*) *Ramsden* v. *Brearley*, L. R., 10 Q. B. 147; 44 L. J., Q. B. 46.

If the Employer, being a *feme sole* at the time the accident happened, should, before the action is brought, marry, she can be sued jointly with her husband under the Married Women's Property Amendment Act, 1874 (*o*); but the husband will only be responsible to the extent of his wife's property which came to him, or would but for his own act or neglect have come to him, upon the marriage.

If either the plaintiff or defendant, the action having been commenced, should die before judgment is pronounced, the action will not abate, but may be continued by or against the personal representatives (*p*).

In any case, where the injury has had a fatal termination, the action must be brought, in either England or Ireland, in manner prescribed by Lord Campbell's Act (*q*).

In such a case the professional adviser must make himself sure that the persons on whose behalf he purposes to sue, are legally entitled to compensation.

Although the Act (*r*) speaks of wife, husband, children, grandchildren, parents, and grandparents (*s*) as being entitled to bring the action, it must be remembered that they are only entitled in the event of their having received pecuniary loss through the death of their relative (*t*). The damages are strictly confined to the pecuniary loss suffered, and the jury may not take into consideration the mental suffering occasioned by the

(*o*) 37 & 38 Vict. c. 50, s. 2.

(*p*) County Court Rules, 1875; Ord. IX. r. 6.

(*q*) 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.

(*r*) Read with the Amending Act.

(*s*) These words including step-children and step-parents. See *ante*, p. 3.

(*t*) *Pym* v. *The Great Northern Rail. Co.*, 2 F. & F. 619; *Sykes* v. *The North Eastern Rail. Co.*, 44 L. J., C. P. 191.

death (*u*), nor may they even award compensation for mourning or funeral expenses (*x*).

Hence it is that money paid to the relatives under a policy of assurance must be deducted from the damages, although, if the injury was not a fatal one, money so paid to the injured person himself could not be deducted (*y*).

Lord Campbell's Act does not extend to Scotland, but by the common law of that country, in any case where negligence causes death, an action can be brought by the wife or children of the deceased against the person guilty of the negligence, to obtain *assythment*, *i.e.*, compensation for pecuniary loss, and *solatium* for wounded affections.

Collateral relations, such as brothers or sisters, cannot bring an action for *assythment* (*z*), but parents may if the deceased child supported them (*a*).

There appears to be no fixed time within which the action for *assythment* must be brought (*b*).

As to who are the proper parties to be sued under the Employers' Liability Act, the question most likely to occasion difficulty is this:—

Who is the Employer? or, with whom did the injured workman enter into a contract of service? It does not follow that the person by whom the workman was engaged becomes his Employer, even although the workman may have thought him to be so. The Courts do

(*u*) *Blake* v. *The Midland Rail. Co.*, 21 L. J. (N. S.) Q. B. 233.

(*x*) *Dalton* v. *The South Eastern Rail. Co.*, 4 C. B. (N. S.) 296; 27 L. J., C. P. 227.

(*y*) *Bradburn* v. *The Great Western Rail. Co.*, 44 L. J., Exch. 9; 23 W. R. 48.

(*z*) *Greenhorn* v. *Addie*, 27 Sc. Jur. 450.

(*a*) *Weems* v. *Love*, 33 Sc. Jur. 521.

(*b*) See Paterson's Compendium of English and Scotch Law, 2nd ed. p. 185.

not hesitate to look behind the mere terms of an engagement, and to discover who the person is whom the workman is really engaged in serving, and if it is found that such person, although he may not be the nominal Employer, exercises over the workman the usual rights of an Employer, such as the right of making rules regulating his work, and the right of dismissing him, they will hold such person to be the true Employer (*c*).

Corporations must be sued in the name of the corporation.

Partners may be sued in the name of their partnership, and the plaintiff may obtain, by application to the registrar of the court, from any one of such partners, the names of all the persons who are co-partners in the partnership, verified on oath or otherwise as the registrar may direct. If the plaintiff wishes to obtain judgment against each member of the firm, he files an affidavit, stating the names of the persons whom he believes are the co-partners, and stating the grounds for such belief, a copy of which affidavit is attached to the summons, together with a notice that if sufficient cause be not shown at the trial, the judge will order judgment against all the persons whose names have been so given and verified (*d*).

---

2. COMMENCEMENT OF ACTION AND PROCEDURE.

The action must be commenced in the County Court in England, in the Sheriff's Court in Scotland, and in the Civil Bill Court in Ireland (*e*).

(*c*) *Charles* v. *Taylor*, 3 C. P. Div. 492; *Rourke* v. *The White Moss Colliery Co.*, *ante*, p. 12.

(*d*) Ord. V. r. 9.

(*e*) 43 & 44 Vict. c. 42, s. 6.

The first step, in England, is the entry of the plaint and issuing of the summons, which must, by the County Court Rules, 1880, made for the purpose of regulating procedure under the Employers' Liability Act (*f*), be served upon the defendant thirty clear days before the return day (*g*).

At the time the summons is issued, the plaintiff must file "*Particulars of demand*," a copy of which must be delivered with the summons (*h*).

The "*Particulars of demand*" are to include the cause of the injury, the date of its occurrence, and the amount of compensation claimed by the plaintiff, or, if more than one, by each plaintiff, and also, where the injury shall have arisen by the act or omission of any person in the service of the defendant, the "*particulars*" are to give the name and description of such person (*i*).

The object of this last clause is, that the defendant may know for whose negligence, and under what section of the Act, it is to be attempted to make him liable; and in order that he may know what evidence to obtain for the purpose of properly defending the action.

Great care must be taken in assigning the injury to the act or omission of a particular person, for although the plaintiff will not probably be strictly bound by what he states to have been the cause of accident, yet, if by his mistake he should prejudice the defendant in his defence, he will, in all likelihood, find himself saddled

(*f*) See the County Court Rules, 1880, in Appendix B.

(*g*) Rule 13. The summons must be delivered to the bailiff thirty-two clear days when it is to be served in the home district, and thirty-five clear days when it is to be served in a foreign district, before the return day (r. 13).

(*h*) Rule 14.

(*i*) Rule 15. For form of "Particulars of Demand" see Appendix C.

with the costs of a postponement of the trial. This risk, however, he must take; for, although it might at first appear that if he sues under the first sub-section of section 1, for injury caused by defective ways, works, machinery, or plant, he need not attribute such injury to the act or omission of any person; yet if the words are read in connection with words in the next section (sect. 2, sub-sect. 1), it will be seen that even here the "*particulars of demand*" must state through whose act or omission the defect arose, or had not been discovered, unless the party to blame should be the Employer himself, in which case it would not appear to be necessary.

Rules have also been made for the consolidation of actions brought by different plaintiffs in respect of the same negligent act or omission, or for the stay of all such actions, *save one*, upon the defendant filing an undertaking to make the decision in such one action a test of his liability in the others (*f*).

Notice of an application by a defendant for consolidation of the actions commenced against him must be given to all the plaintiffs whose actions it is wished to consolidate (*g*), but an application to stay actions for the purpose of having a test action decided, *may* be made in the first instance *ex parte*, but any plaintiff affected by such an *ex parte* order, may apply to the judge to have it discharged (*h*).

Where, in a test action, it is decided that the defendant is liable, the plaintiffs whose actions have been stayed may proceed for the purposes of ascertaining and recovering their damages and costs (*i*).

(*f*) Appendix B., Rules of 1880, rr. 30—38.
(*g*) Rule 31.
(*h*) Rules 34, 35.
(*i*) Rule 36.

Where several plaintiffs sue *jointly*, as provided by the County Court Rules, 1875 (*j*), the amount of compensation recovered shall be awarded to each separately in the judgment, and the costs divided as ordered by the court; and, if the execution issued upon the judgment will not satisfy the whole judgment debt, the amount awarded to each plaintiff shall abate proportionately (*k*).

The plaint should be entered in the county court of that district within which the defendant or defendants, or one of them, shall dwell or carry on business; or, with leave of the judge or registrar, in that district in which the defendant, or one of the defendants, dwelt or carried on business, within six calendar months of such time; or, with similar leave, in that district within which the cause of action or suit wholly or in part arose (*l*).

If, however, the plaintiff and defendant both dwell or carry on business within any of the metropolitan districts (*m*), the plaint may be entered either in the court of the district in which the plaintiff shall dwell or carry on business, or in the court of the district in which the defendant shall dwell or carry on business (*n*).

A defendant is said to dwell at that place where he takes up his permanent residence. If he has two permanent residences it is probably sufficient (*o*), if the plaint is entered in that district where either residence

(*j*) Rules of 1875, Ord. V. r. 1.

(*k*) Rules of 1880, r. 37.

(*l*) 30 & 31 Vict. c. 142, s. 1.

(*m*) This is now extended so as to include the district of the City of London Court (30 & 31 Vict. c. 142, s. 3).

(*n*) 19 & 20 Vict. c. 108, s. 18. And even though the plaintiff may have taken a lodging within such district to enable him to sue. *Massey* v. *Burton*, 2 H. & N. 597.

(*o*) *Bailey* v. *Briant*, 1 E. & E. 340; 28 L. J., Q. B. 86.

is situated, but it is better to get leave to sue, either in the district where the cause of action arose, or in the district where the defendant has dwelt or carried on business within six months (*p*).

A person who has no permanent residence at all can be sued in the district where he may by chance be found (*q*).

A person carries on his business in that district in which he is generally permanently engaged in his business. A servant cannot be said to carry on business where he is employed, for the business is that of his Employer (*r*).

A corporation both dwells and carries on its business at the place where its headquarters are situated, *i.e.*, where its *principal* business and its management are carried on (*s*).

This will often be important where companies, especially railway companies, are to be sued under the Employers' Liability Act, the headquarters of most of the large railway companies being situated in London.

In such cases it is recommended that leave should be obtained (*t*) to sue in that district where the cause of action arose, *i.e.*, the district where the injury, in respect of which the action is to be brought, happened.

A defendant upon receiving the summons may, besides appearing in the ordinary way to defend, or allowing

(*p*) Pitt-Lewis' County Court Practice, Pt. I. p. 266.

(*q*) *Alexander* v. *Jones*, L. R., 1 Exch. 133; 25 L. J., Exch. 78.

(*r*) *Sangster* v. *Kay*, 5 Exch. 386; 19 L. J., Exch. 314.

(*s*) *Oldham Building Co.* v. *Heald*, 3 H. & C. 132; 33 L. J., Exch. 236; *Keynsham Blue Lias Cement Co.* v. *Baker*, 2 H. & C. 739; 33 L. J., Exch. 41.

(*t*) Such leave is obtained upon affidavit; as to form, see Pitt-Lewis' County Court Practice, Pt. I. p. 349.

judgment to go against him by default, adopt any one of the following courses:—

1. He may allow judgment by confession (*u*). The method being by signing in the presence of the registrar or his clerk, or in the presence of a solicitor, a statement admitting the demand, upon which statement the judge at the next sitting of the court gives judgment in the ordinary way. This statement should be signed and given to the registrar at least five clear days before the return day of the summons (*v*).

2. He may have judgment entered against him by agreement with the plaintiff without the matter coming before the judge at all (*w*). This is done in the same way as judgment by confession, save that the statement provides for the payment of the demand and the plaintiff's costs, and contains the terms and conditions upon which the whole shall be paid, and is signed by both plaintiff and defendant.

Upon this statement the registrar enters judgment for the plaintiff.

3. He may pay into court a sum of money as a satisfaction of the plaintiff's damages and costs (*x*). This he should do five clear days before the return day of the summons, but he may do it at any time before the return day subject to having to pay the costs incurred by the plaintiff in preparing for the trial (*y*).

The plaintiff may elect to take the money out of court in full satisfaction of his damages and costs. The defendant is entitled to know if he so elects, a reasonable time before the return day (*z*).

(*u*) 13 & 14 Vict. c. 61, s. 8.
(*v*) Rules of 1875, Ord. XXXVII. r. 44.
(*w*) 13 & 14 Vict. c. 61, s. 9.
(*x*) 9 & 10 Vict. c. 95, s. 82.
(*y*) Order XII. r. 4.
(*z*) Rule 5.

If the plaintiff proceeds to trial and does not recover a greater amount than the amount paid into court, he will have to pay to the defendant the additional costs he has occasioned him, *which costs may be deducted from the amount in court* (*a*).

4. He may apply to have the action removed to a superior court (*b*). He cannot, however, object to the jurisdiction under the County Courts Amendment Act, 1856 (*c*), on the ground that the damages claimed exceed 5*l*., for the Employers' Liability Act expressly says, that all actions thereunder *shall* be brought in a county court, and only gives to either party a power of having the action *removed* into a superior court (*d*). An objection to the jurisdiction of the court, and an application for the *removal* of an action are separate things.

5. He may give notice that he is going to avail himself at the trial of a special defence.

This notice he must give in writing, setting out his name and address, to the registrar of the court five clear days before the return day of the summons (*e*).

The following are the special defences of which such notice must in the ordinary way be given:—

Infancy—Set-off—Coverture—Statutes of Limitation—Discharge under Bankrupt or Insolvent Acts—Statutory defences—Equitable defences.

The defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff,

(*a*) Rule 8.

(*b*) See *post*, Chap. VI., "Power of Removal and Appeal."

(*c*) 19 & 20 Vict. c. 108, s. 39.

(*d*) 43 & 44 Vict. c. 42, sect. 6, sub-s. 1.

(*e*) Order IX. r. 7. See for form of notice of special defence, Appendix C.

any right or claim, whether such set-off or counter-claim sound in damages or not (*f*).

In an action under the Employers' Liability Act, the special defence of infancy will only be available to the limited extent we have before stated (*g*). The special defence of coverture will be a good defence, save in those cases where the married woman is permitted by custom, or by statute, to trade separately from her husband (*h*).

With regard to the special defence of the "Statutes of Limitation," the Employers' Liability Act itself prescribes the time within which actions under the Act must be brought, limiting it in the case of a non-fatal accident to six months from the time of the occurrence of the accident, and in a fatal accident to twelve months from the time of death (*i*).

A discharge under the Bankrupt or Insolvent Acts will be no defence to a claim against an Employer under the Employers' Liability Act, as the demand is not a debt proveable in bankruptcy (*j*).

An equitable defence can scarcely arise to a claim under the Employers' Liability Act, but a defendant may use the defence of "*not guilty by statute*," giving in his notice the year, chapter, and section of the statute on which he relies.

In addition to the above special defences the Employer may, if he has tendered money to the plaintiff as compensation, and before or at the trial pays such money into court, *but only in this event*, avail himself of such

(*f*) County Court Rules, 1876, r. 12.

(*g*) *Ante*, pp. 62—64.

(*h*) *Ante*, p. 64.

(*i*) 43 & 44 Vict. c. 42, s. 4.

(*j*) Williams & Hardcastle's Law of Bankruptcy, 2nd ed. p. 161.

tender as a defence (*j*). In this case, also, he must give five clear days' notice of such tender to the registrar. There is but little difference between this defence of tender and the ordinary case of payment into court (*k*). In effect they are the same, but in the case of payment into court the plaintiff is first apprised of the tender by the registrar.

Again, if a defendant wishes to defend on behalf, or for the benefit of others having the same interest, he must apply to the registrar for leave so to defend, within two days of being served with the summons (*l*).

It may sometimes happen that an Employer, sued under the Employers' Liability Act, although he may deny his legal liability, may yet be unable to dispute the facts set out by the plaintiff in his particulars. In such a case he may sign an admission in the presence of the registrar, or his clerk, or of a solicitor (*m*), of such facts, and submit himself to the judgment that the court shall pronounce upon them. This should be done five clear days before the return day (*n*).

The action may be tried either before a judge alone, before a judge and jury, or before a judge and assessors (*o*). If the amount claimed exceeds 5*l*., either party may, on giving three clear days' notice in writing to the registrar, and depositing with him five shillings for jurors' fees, require a jury to be summoned (*p*). If he has not given this notice, or if the demand is less than five pounds, it is in the discretion of the judge to allow a jury to be summoned or not.

(*j*) Ord. IX. r. 16.
(*k*) *Ante*, p. 72.
(*l*) Ord. IX. r. 2.
(*m*) If in the presence of a solicitor his signature must be verified by affidavit.
(*n*) Ord. XII. r. 3.
(*o*) For form of application for assessors, see Appendix C.
(*p*) Ord. XVI. r. 1.

Either party to an action under the Employers' Liability Act may apply, at least ten clear days' before the return day, to have the action tried by a judge with assessors (*q*). If the application be made by one party, without the consent of the other, the registrar forwards this application to the other party who may either object to assessors, or himself propose others. If both parties propose assessors, the judge selects an equal number from the names proposed by each party, by which selection each party is bound (*r*). In any case where there is no jury, the judge may appoint assessors, although neither plaintiff nor defendant has applied for them (*s*).

(*q*) County Court Rules, 1880, rr. 17—29, as to mode of appointment, remuneration, and privileges of assessors.

(*r*) Rule 20.

(*s*) Rule 23.

CHAPTER VI.

POWER OF REMOVAL AND APPEAL.

It is not proposed to examine at greater length than has been already done, the procedure in an ordinary action in the County Court brought under the Employers' Liability Act, nor to follow the various further steps which are necessary to obtain judgment, and to enforce it. The County Court practitioner is well acquainted with the ordinary procedure of the court, and the chief object of what has already been written thereupon is to enable him more easily to perceive the special features in the procedure required by the Act (*a*).

One further inquiry, however, appertaining to procedure, which is suggested by the Act itself, is this:—

---

1. WHAT IS THE POWER OF REMOVAL OR APPEAL TO THE SUPERIOR COURTS?

And, first, as to the power of removal.

When it is wished to remove an action brought in the County Court, under the Employers' Liability Act, into the High Court of Justice, application must be made to a judge of the High Court, at chambers, for a writ of certiorari. This will be granted when the damages claimed exceed 5*l.*, upon such terms, as to

(*a*) For full information as to County Court procedure, see Pitt-Lewis' County Court Practice.

payment of costs and giving security, as the judge shall think fit (*b*).

When the damages claimed are less than 5*l*., the party applying for the writ must give security for the claim and costs, to be approved by one of the masters of the High Court: such security not exceeding in all the sum of 100*l*. (*c*).

In both cases it is entirely optional with the judge to allow the writ to issue or not, but his decision may be appealed against within eight days.

More than one application to remove an action under the Employers' Liability Act by certiorari to the High Court, on account of the largeness of the amount claimed, has already, to the author's knowledge, been refused. It has been held, although not with reference to the present Act, that it is not a sufficient ground for asking for the writ of certiorari to show that the case involves a principle which it is important for the party applying to have authoritatively decided (*d*). The most usual grounds of such an application are, that the case involves complex questions of law, which the County Court is not able to deal with satisfactorily and decisively (*e*).

An action commenced under the Employers' Liability Act in the Sheriff Court in Scotland, may be removed into the Court of Session by either party at any time within six days after the pronouncing of an *interlocutor* closing the record (*f*); but if the Court of Session should

(*b*) 9 & 10 Vict. c. 95, s. 90.
(*c*) 19 & 20 Vict. c. 108, s. 38.
(*d*) *Solomon* v. *The London, Chatham & Dover Rail. Co.*, 10 W. R. 59.
(*e*) *Rees* v. *Williams*, 7 Exch. 51.
(*f*) 40 & 41 Vict. c. 50, s. 9, sub-s. 1.

be of opinion that the case might properly have been tried in the Sheriff's Court, it may award to the successful party, if the action was removed at his instance, only such costs as he would have been entitled to in the inferior court (*g*).

In Ireland an action may be removed from the Civil Bill Court into the High Court, by order of a divisional court of the High Court, on the same terms as in England, *i. e.*, if the damages claimed exceed 5*l.*, subject to leave and terms; if the damages claimed are less than 5*l.*, subject to leave and giving security for claim and costs, not exceeding in all one hundred pounds (*h*).

As to the power of appeal.

The parties to an action under the Employers' Liability Act may agree that the judgment pronounced by the County Court judge in such action shall be final.

The County Courts Amendment Act, 1856 (*i*), enacts that:—

> "No appeal shall lie from the decision of a County Court, if, before such decision is pronounced, both parties shall agree in writing signed by themselves, or their attorneys, or agents, that the decision of the judge shall be final, and no such agreement shall require a stamp" (*j*).

If the parties have made no such agreement as above, either of them may appeal:—

1. In any case with leave of the judge (*k*).

(*g*) 40 & 41 Vict. c. 50, s. 9, sub-s. 2.

(*h*) 40 & 41 Vict. c. 56, ss. 57, 58.

(*i*) 19 & 20 Vict. c. 108, s. 69.

(*j*) For form of agreement not to appeal, see Appendix C.

(*k*) 30 & 31 Vict. c. 142, s. 13.

2. Without leave, if the damages claimed and lawfully recoverable under the plaint (*l*) exceed 20*l*.

In both of these cases, however, it is only upon questions of law, or questions of the improper reception, or rejection of evidence by the judge, that the parties have a right to appeal (*m*).

There is no appeal from the judgment of the County Court upon a question of fact, at all events where there is any evidence at all to warrant the judge's finding (*n*), even (probably) though the judge has given express permission to appeal upon such question of fact.

There are two modes of appeal:—

1. By special case.
2. By motion.

If the appeal is to be prosecuted by means of a special case, the party appealing must comply with two statutory requirements by giving, within ten days from the day of trial, notice of appeal, and security, approved by the clerk of the court, for the amount of the judgment and the costs of the appeal (*o*).

The ten days within which the notice of appeal must be given shall be exclusive of the day of trial (*p*).

The notice of appeal must be in writing, and must state the grounds of appeal, and must be signed by the appellant, his solicitor or agent, and sent to the registrar of the County Court, as well as to the other party to the action, his solicitor or agent (*q*).

An appeal is no stay of execution (*r*).

(*l*) *Mayer* v. *Burgess*, 4 E. & B. 655; 24 L. J., Q. B. 67.

(*m*) 13 & 14 Vict. c. 61, s. 14.

(*n*) *British Industry Life Assurance Co.* v. *Ward*, 17 C. B. 644.

(*o*) 13 & 14 Vict. c. 61, s. 14.

(*p*) Ord. XXIX. r. 2.

(*q*) Ib. r. 3. For form of appeal, see Appendix C.

(*r*) Ib. r. 4.

The security for the appeal must be given, or at all events offered, during, although accepted after, the same time within which the notice of appeal must be given (*s*).

The party dissatisfied with the judgment of the County Court may, if he choose, deliver the grounds of his dissatisfaction to the registrar of the Court in writing, before the rising of the Court on the day judgment is delivered (*t*); but at the appeal he is not confined to the grounds of dissatisfaction stated, and if he is going to appeal by special case, it would appear unnecessary that he should adopt this course.

The appellant must prepare the special case for appeal, and, having first submitted it to the respondent, must submit it to the judge of the County Court for his signature at the next Court held. If the judge approves of it, he signs it, and it is sealed with the seal of the court. If he does not approve of it, he summons both parties to attend him at a place that he appoints, and there finally settles it (*u*).

If the parties themselves cannot agree to the form of the special case, the County Court judge himself draws it up (*v*).

Within three clear days after the case has been signed and sealed a copy thereof must be sent to the respondent (*w*); and the case itself, with a copy, must within the same time be sent to the Crown Office of the Queen's Bench Division of the High Court of Justice, and notice given to the respondent that this has been done (*x*).

(*s*) *Waterton* v. *Baker*, L. R., 3 Q. B. 173.

(*t*) Ord. XXIX. r. 1.

(*u*) Ib. r. 5. For form of special case, see Appendix C.

(*v*) Ib. r. 6.

(*w*) Ib. r. 7.

(*x*) Pitt-Lewis' County Court Practice, Pt. I. p. 565.

The appeal then comes on in due course for argument before one of the common law divisions of the High Court, and in the argument thereof both appellant and respondent are strictly bound by the facts as stated in the special case.

The costs as a general rule follow the event.

If the appeal is to be by way of motion, such motion is made *ex parte*, within eight days of the trial, to a divisional court of the High Court; or, if a divisional court does not sit within this time, then to a judge at chambers (*y*).

The appeal by motion must be brought on similar grounds to those for which an appeal by special case can be brought; but it can only be brought in this form where at the time of the trial a request has been made to the judge to take a note of the question of law which is to be the subject of the appeal (*z*).

A copy of the County Court judge's notes, signed by him, must be obtained for the use of the judge or judges of the High Court.

If the rule *nisi* is obtained, the order made is one reversing the judgment of the County Court, unless cause be shown within a specified time.

In Scotland, there will be no appeal from the Sheriff Court, if the amount of the damages recovered does not exceed 25*l.*; but if beyond this amount, there is an appeal to the Court of Session (*a*).

In Ireland, an appeal lies from the Civil Bill Court to the judge of assize for the county in which the decree, or dismiss, has been made, at the next assizes, but not

(*y*) 38 & 39 Vict. c. 50, s. 6.

(*z*) *Rhodes* v. *The Liverpool Commercial Investment Co.*, L. R., 4 C. P. Div. 425.

(*a*) 16 & 17 Vict. c. 80 s. 22.

after, and this only on payment, or giving security for costs; and, if the appellant was defendant, on his entering into a recognizance of double the sum decreed, with sufficient bail, to pay the sum which may be ultimately decreed against him, with costs (*b*).

(*b*) 14 & 15 Vict. c. 57, s. 127.

CHAPTER VII.

CONTRIBUTORY NEGLIGENCE.

I. Is the plaintiff disentitled to recover through contributory negligence?

This, our last query, involves a consideration of the utmost importance, especially as it will, in actions under the Employers' Liability Act, doubtless, in most cases, furnish the Employer's ground of defence.

It therefore merits being treated of at somewhat greater length than the preceding enquiries.

The general rule of the Common Law, by which the liability to make compensation for the results of negligence is limited, may be thus stated:—

> A defendant, although found to have been guilty of negligence causing injury to the plaintiff, shall not be held responsible to make any compensation, if the plaintiff himself could have avoided the results of such negligence by the exercise of reasonable care.

In addition to this Common Law qualification, which is available to any defendant sued for damages for negligence, the legislature has provided, in the Employers' Liability Act itself, that contributory negligence of the nature therein specified, shall be an absolute bar to the plaintiff's right to recover.

The words of the Act are (*a*)—

> "In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the Employer, or some person superior to himself in the service of the Employer, unless he was aware that the Employer, or such superior, already knew of the said defect or negligence."

This is a most important section, almost every word of it requiring careful consideration; the questions capable of being raised upon it being numerous.

We purpose, however, to examine in the first place those rules as to contributory negligence which are a part of the Common Law, and afterwards to show what, if any, additional protection is afforded to Employers by the words of the Employers' Liability Act quoted above.

We have stated the Common Law rule to be, that if the plaintiff could avoid the consequences of the defendant's negligence by *ordinary* care he cannot recover; but the mere fact of his being guilty of a degree of negligence, which indirectly occasioned the injury does not disentitle him, if the defendant on his part could by the exercise of reasonable care have avoided the results of such negligence.

"A plaintiff cannot recover damages if, but for his own negligence, the accident would not have happened, though there was negligence on the part of the defendant" (*b*).

In this way the Common Law rule as to contributory

(*a*) 43 & 44 Vict. c. 42, s. 6, sub-s. 3.

(*b*) Addison's Law of Torts, 5th edit. p. 23.

negligence is generally stated by text-writers, but in the attempts made by the Courts to apply it to the facts of particular cases it has proved to be highly embarrassing. We think, moreover, that it is illogical. To say that although the plaintiff has been guilty of negligence, yet he can only recover if the result would have been the same had he exercised ordinary care, appears, in the same sentence, to affirm and deny that the plaintiff has been guilty of negligence. Ordinary care and diligence is all that the law expects or requires from anyone, and therefore to say that the plaintiff can only recover when he has exercised this ordinary care appears to be saying that, *quoad* the cause which led to his injury, he must be, legally speaking, entirely blameless. True, he may have been, at the time of the injury, pursuing a course which might have been regarded as negligence with reference to events which never happened; but, so far as regards the accident, his conduct has been proved by the event, to have been utterly immaterial. How can he then be said to have been guilty of negligence in the matter at all? As well might his negligence at another place and time be imported into the case, and made a matter of serious consideration.

This difficulty appears to have in the main arisen, through a distinction which has been drawn between negligence *per se*, and negligence *contributing* to the accident, it being assumed that the commission of the former does not necessarily disentitle the plaintiff to recover, whilst the commission of the latter does. This distinction, we think, is fallacious; for, if the accident would have happened without the negligence, it is, as above submitted, that, *quoad* the accident, there was no negligence at all: if without the negligence the accident

would not have happened, how can it be said that it did not contribute to it?

But it is further submitted that the above rules do not contain the principles which have influenced the courts in giving decisions upon this subject.

There are cases where, without the plaintiff's negligence, it would have been impossible for the accident to have occurred, and yet the plaintiff has been allowed to recover (*c*).

There are cases where the exercise of reasonable care on the part either of the plaintiff or of the defendant would have avoided the accident, and yet the plaintiff has recovered (*d*). How is this? It is impossible that it can have been by strict application of the rules we have stated, for these rules would have given both to the plaintiff and defendant a *tu quoque* argument, by enabling each to say to the other, "You should have used ordinary care, and thus have avoided my negligence."

Another test is sometimes laid down for discovering whether the plaintiff's own negligence is of such a nature as to disentitle him to relief, *viz.*, to discover whether such negligence was the *proximate* cause of his injury.

If the word "*proximate*" is to be understood strictly as signifying the *nearest* cause of the accident, we should be disposed to think that it would be found to be a tolerably correct test to apply; but one thing is certain, it is not always the person who has been

(*c*) *Greenland* v. *Chaplin*, 5 Exch. Reps. 243, where Pollock, C. B., says, "I think that where the negligence of the party injured did not in any degree contribute to the *immediate* cause of the accident, such negligence ought not to be set up as an answer to the action."

(*d*) *Bridge* v. *The Grand Junction Canal Co.*, 3 M. & W. 244.

guilty of the negligence more culpable in itself who has been the *proximate* or *nearest* cause of the accident.

Negligence, however, may be the *proximate* cause of an injury, without being, with respect to the time of the injury, the immediate cause; therefore the word "*proximate*" must be understood to mean, not nearest or next in the order of *time*, but in the order of *causation* (*e*).

Perhaps the best definition of the rules as to contributory negligence is one given by the two American writers whom we have quoted above (*f*): "One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he by his own, or his agent's, ordinary negligence proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him."

Although the expression "*ordinary negligence*" in this definition is rather vague, yet the whole definition appears to convey tolerably accurately the principles with which the common law decisions upon this subject are reconcileable.

The more we ourselves consider this subject, the more does our conviction strengthen, that the real principle which, although often unrecognizable, underlies all the decisions upon the liability for the results of negligence

(*e*) Shearman and Redfield's Law of Negligence, § 33.

(*f*) Ib. § 25.

where both parties are to blame, is based, at all events to some extent, upon *the degree in which the negligence either of the one or of the other conduced to the result*, and that the legal rule, that the law holds that he who has the last opportunity in time of avoiding the negligence of the other party by using reasonable care, and neglects to do so, has contributed in greater degree than the other to the result, is but a corollary to this principle.

But if the plaintiff and defendant have both been guilty of negligence, and the negligence of each has contributed in equal degree to the injury, the plaintiff cannot recover.

This was shown in a case (*g*) where plaintiff and defendant each appointed a separate agent to superintend the pulling down and re-building of a party-wall between their houses, and, owing to negligence equally attributable to both of such agents, the work was improperly done, and much injury was caused to the plaintiff's home. It was held that neither party could impute negligence to the other, and the plaintiff was nonsuited.

In each of the following cases the DEFENDANT succeeded, because, although in each he himself had been guilty of some negligence, yet the negligence of the plaintiff was held to have been the proximate cause of the injury, or—as we would rather express it—was held to have conduced to the accident in a degree equal to, or greater than, that of the defendant:—

The rules of a colliery demanded, *inter alia*, that the

(*g*) *Hill* v. *Warren*, 2 Star. 377.

rope by which the pitmen descended should be tested daily. This rule was, to the defendants' knowledge, habitually violated. The plaintiff, who also knew of the rule *and of its violation*, yet trusted his descent to the rope, which broke, and occasioned his death (*h*).

The duty was imposed by statute on the defendants, a railway company, of having a man to open and shut their gates at a level crossing. The company neglected this duty, and the plaintiff, who was driving a gig and wished to cross the line, opened the gates himself, and received injury through the gate swinging back (*i*).

[NOTE.—This decision does not appear to have been arrived at by very logical reasoning, and is expressly dissented to by Blackburn, J. The *ratio decidendi* appears to have been that the plaintiff had no right to open the gates himself, but should have waited for a railway official to do so.]

Where the defendant negligently left unattended in a public place a machine, and the plaintiff, a boy four years old, by direction of his brother, aged seven years, put his fingers into the machine, whilst his brother set it in motion, and was thus seriously injured (*j*).

Where the defendant negligently left the wooden covering of a cellar leaning in an almost upright position against a wall in a public street, and the plaintiff, a boy seven years old, playing with it, caused it to fall upon him, and so sustained injury (*k*).

Where the plaintiff, a child seven years old, who was

(*h*) *Senior* v. *Ward*, 1 E. & E. 385; 28 L. J., Q. B. 139.

(*i*) *Wyatt* v. *The Great Western Rail. Co.*, 6 B. & S. 709.

(*j*) *Mangan* v. *Atterton*, L. R., 1 Exch. 239; 35 L. J., Exch. 161.

(*k*) *Hughes* v. *Macfie*, 2 H. & C. 744; 33 L. J., Exch. 177.

in charge of his grandmother, was injured by the grandmother's negligence in crossing the defendants' railway line, to get to the departure platform. There was negligence on the part of the station master in leaving the station unattended, and not warning the passengers who had to cross the line that another train was expected to pass through the station before the arrival of their train; but the injury to the child could have been avoided by the exercise of ordinary caution and prudence on the part of the grandmother (*l*).

[NOTE.—In the above cases where children of tender age have been held disentitled to recover through contributory negligence, such negligence is really attributable to the person who has, or should have, the charge of the child; but the child is identified by what is known in law as "*the doctrine of identification*" with the party truly blameworthy, and has to suffer for the negligence of such party (*m*).]

Where the door of a railway carriage in which the plaintiff was riding flew open several times through a defect in the fastening due to the company's negligence, and the plaintiff, although there was room for him in the carriage away from the door, chose to keep on shutting it. Having done this successfully three times, upon attempting to do the same a fourth time, he fell out, and was injured (*n*).

[This case, which unquestionably involved a very strong decision upon the question of contributory negligence in a plaintiff, has since been questioned (*o*)].

(*l*) *Waite* v. *The North Eastern Rail. Co.*, E. B. & E. 719.

(*m*) See Campbell's Law of Negligence, p. 186.

(*n*) *Adams* v. *The Lancashire and Yorkshire Rail. Co.*, L. R., 4 C. P. 739; 38 L. J., C. P. 277.

(*o*) See Judgment of Brett, J.;

Where the defendant negligently left an obstruction in a public highway, and the plaintiff, who might have seen the obstruction nearly 100 yards off, negligently, through furious riding, rode against it (*p*).

Where the plaintiff, a railway servant, whilst riding upon a trolly on his Employers' line, was injured through the trolly being overturned by running against some pigs belonging to the defendant which had negligently been permitted to stray on to the railway. The defendant had been warned not to let his pigs out on the ground adjoining the railway; but as it was proved to have been the duty of the company to erect sufficient fences to keep cattle (which term was held to include pigs) from coming on to the railway, the plaintiff was, as regards negligence in this respect, "identified" with the company (*q*).

Where the plaintiff, a carman, being sent by his master to the defendant's factory for some goods, was directed, by one of the defendant's servants, to go along a dark passage to the counting-house, and whilst so going fell down a staircase, which was unobservable, and was injured (*r*).

Where the plaintiff, employed to do work in a dark tunnel through which trains passed every few minutes, was injured by a passing train. The company took no precautions to protect him by light, signals, or otherwise, and were found by the jury to have been guilty of negligence; but the plaintiff, having been engaged in

in the case of *Gee* v. *The Metropolitan Rail. Co.*, L. R., 8 Q. B. 161.

(*p*) *Butterfield* v. *Forester*, 11 East, 60.

(*q*) *Child* v. *Hearn*, L. R., 9 Exch. 176.

(*r*) *Wilkinson* v. *Fairrie and Another*, 32 L. J., Exch., N. S. 73.

the work for a fortnight, was held by his continuance therein to have been guilty of negligence disentitling him to recover (*s*).

Where the plaintiff, a passenger in a railway carriage which overshot the platform, was injured whilst getting out. There was no evidence either that the train would have been backed into the station, or that the plaintiff applied that this should be done, or that any railway official was near to whom he could have applied (*t*).

Where the defendants, occupiers of a factory, neglected their statutory duty to fence their machinery, which machinery was put in motion by the plaintiff contrary to the express commands of the defendant. The injury resulted to the plaintiff from such machinery, whilst it was in motion and unfenced (*u*).

In each of the following cases the PLAINTIFF succeeded, because, although there was some negligence on his own part, as well as on the part of the defendant, his negligence did not *proximately* cause the injury; in other words, the defendant's negligence was held to have conduced in a clearly greater degree to the accident than had that of the plaintiff:—

Where the plaintiff entering a train negligently placed his hand on the back of the door, and the guard, without giving any warning, negligently slammed to the door, and injured the plaintiff's hand (*v*).

[NOTE.—Although this case is sometimes cited as one

(*s*) *Woodley* v. *The Metropolitan Rail. Co.*, 2 Exch. Div. 384.

(*t*) *Siner* v. *The Great Western Rail. Co.*, L. R., 3 Exch. 150; and (on appeal) 4 Exch. 117.

(*u*) *Caswell* v. *Worth*, 5 E. & B. 849.

(*v*) *Fordham* v. *The London, Brighton and South Coast Rail. Co.*, L. R., 3 C. P. 368; L. R., 4 C. P. (Exch. Ch.) 619.

in which there was no contributory negligence on the part of the plaintiff, yet Kelly, C. B., in delivering judgment therein, says:—"We do not say there was not a strong case of contributory negligence. The plaintiff no doubt was guilty of much want of caution."

These words are, at the least, equivalent to saying that the plaintiff did not use ordinary care to avoid the injury.]

Where the defendant ran his vessel against the vessel of the plaintiff, and injured the plaintiff's vessel. The collision was caused through the defendant not slackening speed after the plaintiff's vessel was observed coming down upon the wrong side of the river, and with no one on the look-out (*x*).

Where the plaintiff negligently left his ass, with its legs tied, in a public road, and the defendant negligently drove over and injured it (*y*).

Where the plaintiff was injured by the defendant negligently navigating his steamboat, through which negligence it struck against the steamboat in which the plaintiff was being conveyed, and caused an anchor which was suspended thereon to fall upon the plaintiff. The plaintiff was, at the time of the accident, standing in a part of the boat where he had no business to have been, and where had he not been, he would not have received an injury (*z*).

Where a railway company, by shunting trucks on to a private siding, forced onward some trucks which were already standing upon the siding. One of the trucks so pushed onward contained an empty truck which, in

(*x*) *Tuff* v. *Warman*, 5 C. B., N. S. 573; 27 L. J., C. P. 263; 27 L. J., C. P. (Exch. Ch.) 322.

(*y*) *Davies* v. *Mann*, 10 M. & W. 546.

(*z*) *Greenland* v. *Chaplin*, 5 Exch. Rep. 243.

consequence of its height struck against a bridge and caused injury. The plaintiff had been guilty of negligence in not having removed this truck from out of the others some time before the accident occurred (*a*).

[NOTE.—During the trial of this case, Brett, J., said that it was necessary for the plaintiff to prove that the accident happened solely through the defendant's negligence; but this was held to be a misdirection.]

Where defendants had made a dangerous trench in the only outlet from a mews, putting up no fence for protection, and leaving only a narrow passage on which they heaped rubbish, and the plaintiff who knew that this, the only outlet from the mews, was not a safe way, yet attempted to bring his horse this way by leading it over the rubbish, whilst so attempting the horse fell and was killed (*b*).

Where a dog, belonging to the defendant, and which he knew to be of a dangerous nature, bit the plaintiff upon the plaintiff carelessly stepping on the dog's foot (*c*).

[Although this case is an old one it clearly seems to support the proposition as to the negligence of *both* parties conducing to the result which we have stated.]

Where the plaintiff, whilst incautiously and negligently crossing a road, was knocked down and injured by the defendant's vehicle, which was being driven by one of the defendant's servants. The evidence showed that the driver might have seen the plaintiff in time to pull up, if he had been keeping a proper look-out (*d*).

(*a*) *Radley* v. *The London and North Western Rail. Co.*, 1 App. Ca. 754; 46 L. J., Exch. 573.

(*b*) *Clayards* v. *Dethick*, 12 Q. B. (N. S.) 439.

(*c*) *Smith* v. *Pelah*, 2 Str. 1264.

(*d*) *Springett* v. *Ball*, 4 F. & F. 472.

Let us next consider the nature of that contributory negligence which is by the Employers' Liability Act (*e*) made an absolute bar to the plaintiff's right to recover, viz.:—

> "Where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the Employer, or some person superior to himself in the service of the Employer, unless he was aware that the Employer or such superior already knew of the said defect or negligence."

It is easy to understand that a workman may be acquainted with a *defect*, say in machinery, of which his Employer, without negligence, may be in absolute ignorance. If such is the case, and the workman knows, or should, having regard to his duties or his skill, have known, that the defect may at any time lead to an accident, with attendant consequences serious to himself, and he neglects to inform of this defect, the blame undoubtedly rests entirely with himself, and he is rightly burdened with the responsibility.

It is not, however, so easy to understand in what sense the words "knew of the *negligence* which caused his injury" may in every case be interpreted.

The particular act of negligence of "the person with superintendence entrusted to him," for whose negligence the Employer is now responsible, will usually occur almost contemporaneously with the injury which it causes; and thus, in few cases, will the workman have the opportunity of complaining of *that* act of negligence.

(*e*) Sect. 2, sub-s. 3.

But, of course, it may happen that such person may have been guilty of negligence on former occasions to the knowledge of the workman, which negligence, however, did not result in injury. Ought the workman, then, to have complained to the Employer at once, and is every workman who may have known of such negligence thenceforward disentitled to recover, in case he should suffer injury from the repeated negligent acts of the same person? True, the Act uses the words "the negligence which caused his injury," but would it not be open to contention that *negligence of disposition* in the person entrusted with superintendence, of which the workman is aware, and which continually renders his employment dangerous, is also included in the words, for is not such negligence continuing and ever present negligence?

In such cases both judges and juries will probably be much guided by the degree and frequency of the negligence, of which the person who caused the accident had been guilty upon former occasions.

Let us take two illustrations to make our meaning clearer:—

A foreman is guilty of an act of negligence, gross, if you will, from which a workman barely escapes receiving serious injury. A month afterwards the same foreman repeats the same negligent act, with the result that the workman, who on the former occasion escaped, receives injury. It is believed that such workman could recover, notwithstanding that he had not informed the Employer of the first negligent act.

Again, a foreman is in the habit of coming to a factory in an intoxicated state. This fact is well known to the workmen over whom he acts as foreman, and they

also know that their Employer is unaware of it, and that the foreman's duties are such that they cannot be performed with safety by an intoxicated man. The foreman, whilst intoxicated, is guilty of negligence, causing injury to one of the workmen. It is believed that such workman would not recover if he had failed to inform the Employer of the foreman's habitual intoxication.

It may be urged that these illustrations differ only in degree. This is so, but it is believed that it will be almost entirely upon the question of the degree of the previous negligence uncomplained of, that claims, in such cases, will succeed or fail.

The obligation is by the Act only imposed upon the workman of giving notice of defects, or negligence, which, if allowed to continue, may be reasonably likely to cause injury to *himself;* he is not by the Act made an *inspector* either of his Employer's works, plant, or employés.

In an action in which there should be written pleadings, it will not be necessary for the plaintiff to allege therein, that he was ignorant of the defect or danger which caused his injury (*f*), nor will the onus lie upon him in an ordinary action in the County Court under the Act, of proving his ignorance in this respect, until some evidence has been adduced by the defendant, from which his knowledge thereof may be *primâ facie* implied.

If the workman knows of a defect, or of negligence, likely to occasion him injury, he must give notice thereof "*within a reasonable time.*"

With respect to giving notice of a *defect*, the words "*within a reasonable time*" will doubtless be held to mean the first reasonable opportunity after the know-

(*f*) *Watling* v. *Oastler*, L. R., 6 Exch. 73.

ledge came to him. If he misses such reasonable opportunity of giving notice, and again exposes himself to the danger incident to the defect, he will be disentitled to recover. But the question arises in the same way as before, as to what is a "*reasonable time*" within which the workman will have to give notice of *general negligence of character*, in the person for whose negligent acts the Employer is to be held responsible, and from which *general negligence* the *particular* negligence might have been expected by the workman to happen. We can only repeat, that in our opinion it is not of a solitary act, or of rare acts of negligence which the Act makes it incumbent upon the workman to inform the Employer—for even a reasonably careful man may commit these—but that it becomes obligatory to give notice, within a reasonable time, from the time when the workman first discovered, or having regard to the facts within his knowledge ought to have discovered, that the risks incident to his employment were materially added to by the negligence of the person, of whose negligence it is his duty to inform.

The notice required by the Act need not be given by the workman *personally*, or to the Employer *personally*. He may "*give or cause it to be given*" to the Employer, or "*give or cause it to be given*" to "some person superior to himself in the service of the Employer."

Previously to the Act, an Employer was not fixed with knowledge of negligence, by such negligence having been told to his foreman (*g*).

Of course, if the workman is going to rely upon the notice being given to the Employer *personally*, it will not be sufficient for him to show that he told some one

(*g*) *Smith* v. *Howard*, 22 L. T., Exch. 130.

to tell him, but he will have to prove that the notice actually reached the Employer.

The requirements of the Act, however, are satisfied if the notice is given by the workman to "*some person superior to himself in the service of the Employer*," although such notice never reaches the Employer himself.

This expression is ambiguous, and will, it is believed, cause some difficulty.

One workman may be superior to another, in being employed in a higher class of work, or in being paid higher wages, yet it could hardly be argued that the giving notice to a person, superior in such respects, should be held to be a compliance with the requirements of the Act.

Again, one workman may be clearly superior to another in the employment, but his duties may be confined to an entirely distinct branch of work, and may be totally unconnected with the *defect* or *negligence* of which notice is given to him. Surely, in this case again, the Employer would not be held to be affected with the notice.

It is suggested that what was probably intended by Parliament would have been more plainly expressed as follows:—

> "To the Employer, or some person entrusted with any duties of superintendence in, or over, that department in which the defect or negligence existed, whether such superintendent be ordinarily engaged in manual labour or not, unless the injured person should himself perform duties of superintendence, in which case such person must have given notice to the Employer, or to a person entrusted with any superintendence over himself."

When a workman has given notice of a defect, or of negligence, of which the Employer was previously unaware, and the Employer takes immediate steps to have it remedied, but, before it is actually remedied, injury results therefrom to the workman, we do not think he would be able to recover, for the Act requires that there should be negligence on the part of the Employer, or some person for whom he is made responsible, in not having the defect remedied, and in this case there would have been none.

In like manner, if the notice has been given to a workman, a reasonable time must be allowed him within which to inform the Employer, and then a further reasonable time for the Employer to have the defect or negligence remedied, if such workman has not authority to remedy it himself.

But let us take the illustration we have before used, as to a workman giving notice of the habitual drunkenness of his foreman.

Upon receiving such a notice the Employer gives the foreman a month's notice to quit, before the expiration of which time, through negligence attributable to his reiterated drunkenness, injury is caused to the workman. Here we are of opinion that the Employer would be responsible; for, although the workman has continued in the employ with knowledge of the danger, yet, as in such a case the Employer would have been justified in dismissing the foreman without any notice, he has not taken the most efficient means in his power to remedy the negligence (*h*).

Let us assume, however, that the Employer refuses to

(*h*) This has practically been decided in an American case, *Laning* v. *The New York Central Rail. Co.*, 49 N. Y. 521.

credit the complaint of drunkenness, and distinctly declines to dismiss the foreman. We think that if, after this decision is clearly made known to him, the workman still chooses to continue in the employ, he will be held to have taken this risk as a risk incidental to his service (*i*).

Even should the workman upon learning the Employer's decision at once have given notice to leave, and the injury have occurred to him during the continuance of such notice, it is open to the Employer to say, "If you knew my foreman's drunkenness rendered your employment dangerous, you should have done what you would have been legally justified in doing, and have left my employment without notice."

With what result such a defence on the part of an Employer would be used, we do not venture to predict.

In any case if the Employer promises to remedy the defect or negligence, and does not do so, and the workman continues in the service relying upon this promise, he can recover if injured (*k*),

> "*Unless he was aware that the Employer or such superior already knew of the said defect or negligence.*"

Here again, if we were called upon to criticise, we should say that the clause would be improved, and its real meaning more apparent, if the words "*he was aware that*" were omitted.

> The clause would then read "*unless the Employer or such superior already knew of the said defect or negligence.*"

(*i*) See Shearman and Redfield's Law of Negligence, p. 124.

(*k*) *Holmes* v. *Clarke*, 6 H. & N. 349; 30 L. J., Exch. 135; 7 H. & N. 937; and ante, p. 49.

It can never have been intended that the Employer's liability was to depend upon, whether the workman *was aware* that he was aware of the defect or negligence; but rather upon whether *as a fact* he knew of such defect or negligence, and allowed it to continue unremedied, for herein consists his negligence.

When a workman has failed to give notice of a defect, or of negligence, which afterwards occasions him injury, he may show either that the Employer or the workman superior to himself had either actual or constructive notice thereof.

Actual notice would be where the Employer or the superior workman has been expressly informed of the defect or negligence, or where he has admitted that he knew of it.

Constructive notice would be where the Employer or the superior workman, without being specially informed of the defect or negligence, has yet been informed or knows of other facts which ought to have brought to his knowledge the defect or negligence, or where, for the purpose of avoiding such knowledge he omits to make inquiry.

Mere omission to make inquiry, however, on the part of the Employer, when there is no proof of facts having been disclosed to him, which might reasonably have excited his suspicion, will not be a sufficient ground to fix him with constructive notice.

We think it may be said that, for the purposes of the Employers' Liability Act, constructive notice will be nothing more than proof, by means of circumstantial evidence, of *actual* notice to the Employer, of *some* defect or negligence, although he may not be fully aware of its nature and degree.

It will always be a course attended with risk, for the workman who has omitted to give notice of defects, or negligence, of which he was aware, to rely upon the fact of the Employer or superior workman already knowing thereof; for however fully he may prove that he believed this to have been the case, and however reasonable that belief may have been, he cannot succeed if such knowledge did not as a fact exist.

Lastly, if it is wished to rely upon a superior workman knowing of the defect or negligence, such person must be a superior in the sense which we have before stated, viz. he must have some duties of superintendence over the workman, or in, or over, the department in which the defect or negligence was said to exist, subject to the like exception in case the workman injured should himself fulfil duties of superintendence (*l*).

To endeavour briefly to sum up, what has been said upon this section of the Act (*m*):—If a workman knows of a defect, he must inform thereof at once, and can only excuse his failure to do so by showing that the Employer, or a person with superintendence over himself, or in, or over the department where the defect was, actually knew of the same already.

Of negligence, the consequences of which have not already happened, and which may still be averted, he must inform at once, and of *general negligence of character*, he must complain as soon as it becomes so great as to materially increase his risks in his employment; and in both cases the notice must be given either to the Employer himself, or to a workman, "superior" in the sense which we have indicated.

(*l*) Ante, p. 100.

(*m*) Sect. 2, sub-s. 3.

If he does not give the notice himself, he must prove that he caused it to be given, *i. e.*, that it actually was given.

In fine, we should counsel those for whose aid we have written, to think once and again before bringing an action, under the Employers' Liability Act, where there is evidence that the workman knew beforehand of that which caused his injury, and did not give notice of it.

APPENDIX A.

CASES ALREADY DECIDED UNDER THE EMPLOYERS' LIABILITY ACT.

(1.)

WHITEHAVEN COUNTY COURT, *April*, 1881.

Moore v. The Whitehaven Hematite Iron and Steel Co.

Claim by father for 150*l.* for loss occasioned by the death of his son through defendants', his employers', negligence. On the 28th January, when the deceased had finished his day's work in the defendants' pit, he was told by one of defendants' servants, whose duty it was, to get into the cage for ascent. Before the winding up of the cage began a large mass of ice fell from the side of the shaft, crushed the cage and fatally injured the deceased.

There was evidence that ice had fallen in a similar way the day before, and some evidence on the part of the defendants that it was impossible to keep ice out of the shaft.

Verdict for plaintiff. Damages 72*l.*

(2.)

WESTMINSTER COUNTY COURT, *July*, 1881.

Langham v. Young & Co.

Claim for 50*l.* for injury received in defendants' service. Plaintiff was engaged in painting, and for this purpose was standing upon a swing scaffold which was raised and lowered by means of ropes and blocks. On the third day of this scaffold being used one of the ropes broke at a part where it had been spliced and occasioned the injury to the plaintiff. It was admitted by both parties that a splice in a rope is not usually looked upon as a defect, but rather the reverse.

Contended on behalf of the defendants that, as plaintiff had not only erected his own scaffold but actually selected the rope from amongst others, any of which he could have taken, he had voluntarily incurred the risk of defect.

Verdict for plaintiff. Damages 50*l.*

New trial granted.

(3.)

Bow County Court.

Faul v. Fletcher & Co.

The plaintiff, who was employed to drill holes in the iron plates of a vessel, sued for damages for injury caused by the falling of an iron knee which had been bolted on to the ship's side by a bolt which broke. Admitted that the foreman supplied a stronger bolt after the accident, but contended by the defendants that the bolt was sufficient for all ordinary purposes, but had been unduly strained by the plaintiff.

Judgment for the defendants.

Note.—In this case the question arose whether a notice of injury given by letter, *unregistered*, but which was admitted to have been received, was a compliance with the act. Held that it was.

(4.)

Croydon County Court.

Bicknall v. Jenkins.

Claim by a painter for 362*l.* for injury occasioned to him through the negligence of defendant's foreman. The plaintiff was painting a ceiling, standing on a scaffolding, consisting of a board resting upon a pair of steps at one end and two loose boxes, one upon the other, at the other end. Evidence on the part of the plaintiff that the foreman helped to erect this scaffolding, but also evidence on the part of the defendant that the foreman offered to go to the defendant's workshop for proper scaffolding, but that the plaintiff and his fellow-workmen refused this offer.

Verdict for the defendant.

New trial refused.

(5.)

CLERKENWELL COUNTY COURT, *August*, 1881.

Robins v. Cubitt & Co.

Claim by plaintiff for 400*l.* for injury caused to him through a pail which was being lowered from a scaffold becoming unhooked and falling upon him. The jury found that the accident was caused by the pail becoming detached from the hook owing to the negligence of the men at the top and bottom of the whip and fall.

Verdict for plaintiff. Damages 50*l.*

NOTE.—It is believed that an appeal is pending in this case.

(6.)

BRADFORD COUNTY COURT, *August*, 1881.

Whitaker v. Bamforth.

Claim for 156*l.* (three years' wages) as compensation for personal injuries sustained by plaintiff in defendant's employ. Plaintiff was lawfully employed drilling holes in an iron casting, which casting had to be raised by blocks and chains. The bolt to which the block was attached broke whilst the casting was being lifted, and so seriously injured the plaintiff's leg that it had to be amputated. It was proved that the bolt had been selected by the foreman, and that it was an old one, but it was also proved that on one occasion it had borne the strain of a ton weight.

Judgment for plaintiff. Damages 156*l.*

(7.)

MANCHESTER COUNTY COURT, *August*, 1881.

Farley v. Clemson.

Claim by an infant, suing by his next friend, for 50*l.*, compensation for injuries received in defendant's service.

Notice of injury had been given in the following words: "The boy Wm. Farley, who was hurt at your mill on the

22nd February, will require a considerable sum of compensation. Do you think we can settle the matter out of court, or must we bring an action?"

Held, that this notice was insufficient.

Plaintiff non-suited.

(8.)

SOUTHWARK COUNTY COURT, *October*, 1881.

Clark v. Nelson Dock Company.

Claim by an infant for 50*l.*, compensation for injury. The evidence showed that the accident was caused by the plaintiff incautiously leaning over some unfenced machinery, for the purpose of working a wheel which it was no part of his duty to work.

Plaintiff non-suited.

NOTE.—In this case the judge allowed the summons to be amended by the insertion of the next friend of the infant.

(9.)

BATH COUNTY COURT, *August*, 1881.

Love v. Wibley.

Plaintiff claimed 150*l.* for injuries occasioned whilst in defendant's service, through the breaking of a ladder on which he was working. The ladder was taken from the shed, in which ladders were kept by the defendant for the purposes of the work, by a fellow-workman of the plaintiff. It was admitted that such fellow-workman broke one of the Employer's rules in taking the ladder himself, and not asking for one from the foreman; but this rule was found not to have been at any time strictly observed.

There was also evidence that the defendant never purchased new ladders, but had second-hand ones repainted: and it was found that the ladder in question broke in consequence of being in a rotten state. Judgment for plaintiff.

Damages 40*l.*

On application of defendant's counsel, amount brought into Court to await result of appeal.

(10.)

OLDHAM COUNTY COURT.

Bromley, Executrix of v. The Oldham Corporation.

Plaintiff, executrix of Charles Bromley, sued for 187*l.* 4*s.* for pecuniary loss caused by the death of her husband through the negligence of the defendants.

The deceased was employed at the waterworks of the Oldham Corporation, and was ordered by the defendants' foreman to go up a derrick pole and fix a rope to a wooden guy at the top of a crane, for the purpose of removing it.

This he did, but when the weight of the guy came upon the derrick pole it fell, and the deceased, in attempting to escape falling with the derrick pole, clung to the guy, which was still attached to an upright, with the result that the guy and upright came down, and occasioned the injury which resulted in death. The derrick pole was only fastened by an iron pin two and a half inches long; but there was some evidence that this was the mode usually adopted.

Judgment for the plaintiff. Damages one hundred guineas and costs.

NOTE.—In this a question arose as to the notice of the accident not having been given within the required time, viz., six weeks. The "*reasonable excuse*" relied upon by the plaintiff, was, that the widow was in an advanced state of pregnancy, and so excited in mind, that her medical man ordered her not to be consulted on the subject. Held, that this excuse was "*reasonable.*"

(11.)

COCKERMOUTH COUNTY COURT, *October*, 1881.

Wallace v. The St. Helen's Colliery Co.

In this case the plaintiff claimed 50*l.* for injuries received through an explosion in the defendants' coal mine, caused by one of the defendants' foremen placing a light at the side of the shaft.

Verdict for plaintiff. Damages 15*l.*

NOTE.—In this case the formal notice had not been given until ten weeks after the injury received; but, within fifteen days of the event, the plaintiff wrote to defendants' manager stating that he should hold the company liable, and claiming compensation; and it was held by the judge that this notice was sufficient.*

---

* N.B.—The Author believes this decision to be questionable.

(12.)

NOTTINGHAM COUNTY COURT, *October*, 1881.

Topham v. Goodwin.

Claim by an infant, suing by his next friend, for 120*l.* for injuries received in defendant's employ through defective machinery. Plaintiff was employed to work a circular saw, which saw was kept in its place by packing. Plaintiff, in attempting to put the packing back in its place, whilst the saw was in motion, was injured. Contended by the plaintiff that there ought to have been a loose pulley for the purpose of putting the saw out of gear when required. Held, that this was not a "*defect*" in machinery contemplated by the Act, and, further, that plaintiff, in putting in the packing with his fingers, contributed to his own injury.

Plaintiff non-suited.

(13.)

SOUTHWARK COUNTY COURT, *October*, 1881.

Stevens, Executrix of v. Maudslay & Co.

Claim by the widow of Wm. Stevens, who was killed whilst in the defendants' employ.

Deceased was engaged with another man in taking down the plate of a large boiler, when, in consequence of the "grab" slipping, it fell upon him, and killed him instantaneously. It was alleged on behalf of the plaintiff that it was the duty of the foreman to see that the "grab" was properly screwed. It was also alleged that the unsafe position of the boiler had been pointed out to the foreman by another workman, but that he took no notice. The jury found that the mode of taking down the boiler was unsafe.

Verdict for plaintiff. Damages 182*l.*

Judgment postponed for a fortnight.

APPENDIX B.

COUNTY COURT RULES, 1880.

ORDER XXXIX*b*.

THE EMPLOYERS' LIABILITY ACT, 1880.

Service of Summons.

1. *Summonses when to be served.*]—13. A summons in an action brought under the provisions of the Employers' Liability Act, 1880, where it is to be served in the home district, shall be delivered to the bailiff thirty-two clear days at least, and where it is to be served in a foreign district, thirty-five clear days before the return day, but it shall in either case be served thirty clear days before the return day thereof.

2. *Particulars to be filed.*]—14. Particulars of demand shall be filed by the plaintiff at the time of the entry of the plaint, whatever the amount claimed may be; and a copy thereof shall be forthwith sent to the judge.

3. *What particulars of demand shall state.*]—15. The particulars of demand shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed, and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff, and where the injury of which the plaintiff complains shall have arisen by reason of the act or omission of any person in the service of the defendant, the particulars shall give the name and description of such person.

Jury.

4. *Notice of demand for a jury.*]—16. Notice of a demand for a jury shall be given in writing to the registrar of the Court fifteen clear days at least before the return day, and the summonses to the intended jurors shall be delivered to the bailiff forthwith.

Assessors.

5. *Qualification of assessors.*]—17. Any person who shall, as hereinafter provided, be appointed by the judge to act as an assessor in the action, shall be qualified so to act.

6. *How assessors are to be applied for.*]—18. Where no demand for a jury shall have been made, a party who desires assessors to be appointed shall, ten clear days at least before the return day, file an application according to the form in the schedule, stating the number of assessors he proposes to be appointed, and the names, addresses, and occupations of the persons who may have expressed their willingness in writing to act as assessors. If the applicant has obtained the consent of the other party to the persons named being appointed, he shall file such consent with his application.

7. *Where application for assessors made by one party only, it shall be forwarded to the other party.*]—19. Where the application for the appointment of assessors has been made by one party to an action only, the registrar shall forward the application so made to the other party, who may then either file an application for assessors, or file objections to one or more of the persons proposed.

8. *Where both parties propose assessors, no objection to be allowed to persons proposed.*]—20. Where separate applications are filed by the parties, no objection to the persons proposed shall be made by either party, but the judge may appoint from the persons named in each application one or more assessor or assessors, provided that the same number of assessors be appointed from the names given in such applications respectively.

9. *Application to be forwarded to judge.*]—21. The applications for the appointment of assessors, together with any objections made to the persons proposed, shall be forwarded by the registrar to the judge.

10. *If judge grant application for assessors he shall appoint such of the persons proposed as he may think fit.*]—22. Where the judge shall grant the application for the appointment of assessors he shall appoint such of the persons proposed for assessors as he may think fit, subject to the provisions hereinbefore or hereinafter contained in this order.

11. *Judge, whether application has or has not been made, may appoint assessors.*]—23. In any action where no demand for a jury has been made, and an application for the

appointment of assessors has been filed, the judge may, either before or at the return day, nominate one or more additional persons to act as assessor or assessors in the action. Where no application for assessors has been made, the judge may, if he think fit, appoint any one or more persons to act as assessor or assessors in the action before or at the return day.

12. *Where assessors fail to attend.*]—24. If at the time and place appointed for the trial all or any of the assessors appointed shall not attend, the judge may either proceed to try the action with the assistance of such of the assessors, if any, as shall attend, or he may adjourn the trial generally, or upon any terms which he may think fit, or he may appoint any person who may be available and who is willing to act, and who is not objected to or who if objected to is objected to on some insufficient ground, or the judge may try the action without assessors if he shall think fit.

13. *Remuneration of assessors.*]—25. Every person nominated as an assessor shall receive for each day's attendance in every action the sum of two guineas, together with such further sum, if any, for his expenses as the judge may order.

14. *Deposit on application for assessors of amount of their remuneration.*]—26. Every person requiring the judge to be assisted by assessors shall at the time of filing his application deposit with the registrar the sum of two guineas for each assessor proposed, and such payments shall be considered as costs in the action, unless otherwise ordered by the judge. Provided that where a person proposed as an assessor shall have in writing informed the registrar that he does not require his remuneration to be so deposited, no deposit in respect of such person shall be required.

15. *Remuneration of assessors not proposed by the parties but appointed by judge.*]—27. Where an action shall be tried by the judge with the assistance of any assessors in addition to or independently of any assessors proposed by the parties the remuneration of such assessors shall be borne by the parties, or either of them, as the judge shall direct.

16. *Where action not tried an allowance to be made to assessors by order of judge.*]—28. If after an assessor has been appointed the action shall not be tried, the judge shall have power to make an allowance to him in respect

of any expense or trouble which he may have incurred by reason of his appointment, and direct the payment to be made out of the sum deposited for his remuneration.

17. *Assessors to sit with judge.*]—29. The assessors shall sit in Court with the judge, and assist him when required with their opinion and special knowledge for the purpose of ascertaining the amount of compensation, if any, which the plaintiff shall be entitled to recover.

Consolidation of Actions or Stay of Proceedings.

18. *Consolidation of actions.*]—30. Where several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act, or omission, the defendant shall be at liberty to apply to the judge that the said actions shall be consolidated.

19. *Opposite party to have notice.*]—31. Applications for consolidation of actions shall be made upon notice to the plaintiffs affected by such consolidation.

20. *Stay of proceedings.*]—32. In case several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act, or omission, the defendant may, on filing an undertaking to be bound so far as his liability for such negligence, act, or omission is concerned by the decision in such one of the said actions as may be selected by the judge apply to the judge for an order to stay the proceedings in the actions other than in the one so selected, until judgment is given in such selected action.

21. *Stay of proceedings; application for.*]—33. Applications for stay of proceedings shall be made upon notice to the plaintiffs affected by stay of proceedings or ex parte.

22. *Judge may impose terms.*]—34. Upon the hearing of any application for consolidation of actions or for stay of proceedings, the judge shall have power to impose such terms and conditions and make such order in the matter as may be just.

23. *Where order for stay of proceedings is made ex parte.*]—35. If any order shall be made by a judge upon an ex parte application to stay proceedings, it shall be competent to the plaintiffs affected by such order to apply to the judge, upon notice or ex parte, to vary or discharge the order so made, and upon such last-mentioned application such order shall be made as the judge shall think fit, and the judge

shall have power to dispose of the costs occasioned by such order or orders as he may deem right.

24. *Where verdict given in selected action.*]—36. In case a verdict in the selected action shall be given against the defendant, the plaintiffs in the actions stayed shall be at liberty to proceed for the purpose of ascertaining and recovering their damages and costs.

25. *Defendant may admit his liability.*]—37. A defendant may admit the truth in the plaintiffs' particulars in the actions of any statement of his liability for such negligence, act, or omission, and thereupon the provisions of Order XII. rule 3, shall apply.

26. *Where more plaintiffs than one compensation due to each to be found.*]—Where two or more persons are joined as plaintiffs under Order V. rule 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of compensation, if any, that each plaintiff is entitled to shall be separately found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the Court may think fit.

Should the defendant fail to pay the several amounts of compensation and the costs awarded in the action, execution against his goods may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amounts awarded, a dividend shall be paid to each plaintiff, calculated upon the proportion of the amount which shall have been awarded to the respective plaintiffs to the total amount realised after the deduction of all the costs of the action as aforesaid.

APPENDIX C.

FORMS.

1. *Notice of Injury.*

Employers' Liability Act, 1880.

[*Date.*]

I HEREBY give you notice that [*insert name*] of [*insert address*], was on the day of , 18 , injured [*or* killed] upon premises situate at [*insert place where injury occurred*], in consequence of [*here insert shortly the cause of the injury*], he being at such time a workman in your employ and lawfully engaged in his employment.

Signed .

To [*insert Employer's name*]
of [*insert address*].

---

2. *Form of Particulars of Demand.*

This action is brought—

For that the plaintiff [*or* plaintiffs] being on the day of , 18 , lawfully employed upon the defendant's work under a contract of service made with the defendant was on such day injured through the breaking of a portion of the defendant's machinery, to wit a wheel, such machinery being defective, and such defect having arisen [*or*, not having been discovered] through the negligence of one A. B., likewise a servant in defendant's employment, and entrusted by the defendant with the duty of the inspection of his machinery.

And the plaintiff claims, therefore, £ damages [*or*] each of the plaintiffs claim, therefore, £ damages.

---

3. *Form of Special Defences.*

In the County Court of holden at .

Between A. B. ..... Plaintiff,
and
C. D. ..... Defendant.

Take notice, that the defendant intends at the hearing of this cause to give in evidence and rely upon the following ground of defence.

Dated the day of 18 .

[*The defendant or his solicitor.*]

To the Registrar of the Court.

Coverture.

That the defendant is now [*or* was at the time that the alleged claim arose] the wife of of and that she was married to him at in the county of on the day of 18 and that she resides at in the county of .

Statute of Limitations.

or, That the claim for which defendant is summoned is barred by a statute of limitations.

---

4. *Form of Agreement not to appeal.*

[Title of action.]

We [*or* the respective agents or solicitors of] the above-named plaintiff and defendant do hereby, under the provisions of sect. 69 of the County Courts Act, 1856, agree that the decision of the judge of this Court in this action shall be final.

Given under our hands this day of 18 .

——— plaintiff [*or his solicitor*].

——— defendant [*or his solicitor*].

---

5. *Form of Appeal.*

[No. of plaint.]

In the County Court of holden at .

Between A. B. ..... Plaintiff,
and
C. D. ..... Defendant.

Take notice, that I, the above-named defendant [*or* plaintiff], being dissatisfied with the determination [*or* direction] of the judge upon the following point of law [*here state ground of appeal*], [*or* being dissatisfied with the reception (*or* rejection) of the following evidence (*here state the evidence wrongfully received or rejected*)], intend appealing against the same to the High Court of Justice.

(Signed) [*plaintiff, or defendant, or his adviser*].

Dated the day of 18 .

To [*plaintiff or defendant*].

---

6. *Form of Special Case.*

In the County Court of holden at .

On Appeal to the High Court of Justice.
Queen's Bench Division.

Between A. B. ..... Plaintiff,
and
C. D. ..... Defendant.

This is an action [*here state the cause of the action and the facts*].

The questions for the opinion of the Court are:—

First. [*here state the questions for the opinion of the Court consecutively.*]

[*Signature of Judge.*]

---

7. *Form of Application for Assessors.*

The Employers' Liability Act, 1880.

In the County Court of holden at .

Between A. B. ..... Plaintiff,
and
C. D. ..... Defendant.

The plaintiff [*or* defendant] applies to have an assessor [*or* assessors] appointed to assist the Court in ascertaining the amount of compensation to be awarded to the plaintiff should the judgment be in his favour, and he submits the names of the following persons who have expressed their willingness in writing to act as assessors should they be appointed:—

[*Here set out names, addresses and occupations of the persons referred to.*]

*The defendant [*or* plaintiff] consents to the appointment of any of the persons above named to act as assessors in this action as appears by his consent thereto filed herewith.

——— plaintiff [*or* defendant].

* Where the other party does not consent, or where the other party has filed an application for the appointment of assessors, strike this paragraph out.

INDEX.

LONDON:
PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS,
CHANCERY LANE, E.C.

LAW WORKS FOR STUDENTS.

Mr. Serjeant Stephen's Commentaries on the Laws of England. By JAMES STEPHEN, Esq., LL.D., Judge of County Courts. The Eighth Edition. Prepared for the Press by HENRY ST. JAMES STEPHEN, Esq., of the Middle Temple, Barrister-at-Law. 4 vols. 8vo. 4*l.* 4*s.* cloth.

*** This Work is set for the Intermediate Examination for Solicitors for 1881 and 1882.

Mozley and Whiteley's Concise Law Dictionary. 8vo. 20*s.* cloth.

"Law students desirous of cramming will find it acceptable."—*Law Times.*

Tudor's Selection of Leading Cases on Real Property, Conveyancing, Wills and Deeds. 3rd Edit. Roy. 8vo. 2*l.* 12*s.* 6*d.* cloth.

Kelly's Conveyancing Draftsman. 2nd Edit. Post 8vo. 12*s.* 6*d.* cloth.

"A very useful little book for conveyancing practitioners, *i. e.* for solicitors and students."—*Law Magazine.*

Plumptre's Principles of the Law of Simple Contracts. Post 8vo. 8*s.* cloth.

*** A companion volume to Underhill on Torts.

Underhill's Manual of Chancery Procedure. Post 8vo. 10*s.* 6*d.* cloth.

Underhill's Law of Torts or Wrongs. Third Edition. Post 8vo. 8*s.* cloth.

"He has set forth the elements of the law with clearness and accuracy."—*Law Times.*

Underhill's Law of Trusts and Trustees. Post 8vo. 8s. cl.

Fulton's Manual of Constitutional History. Post 8vo. 7*s.* 6*d.* cloth.

Chute's Relation of Equity to Common Law. Post 8vo. 9*s.* cloth.

Trower's Manual of the Prevalence of Equity under Section 25 of the Judicature Act, 1873, amended by the Judicature Act, 1875. By CHARLES FRANCIS TROWER, Esq., M.A., Barrister at Law. In 8vo. 5*s.* cloth.

In 8vo., 3s., by post 3s. 1d. Nos. 3, 6, 7 and 9 to 16, both inclusive, may still be had.

The Bar Examination Journal. Edited by A. D. Tyssen and W. D. EDWARDS, Esqrs., Barristers-at-Law.

In 8vo., 1s., by post, 1s. 1d. Nos. 1 to 47 may still be had.

The Law Examination Journal and Law Student's Magazine. Edited by H. N. MOZLEY, Esq., Barrister-at-Law.

CONTENTS OF EACH NUMBER.—Leading Articles by the Editor; Reviews of Books; Summary of new Decisions in Banco and at Nisi Prius; Analysis of the more important practical Statutes of the Session; Intermediate Examination Questions and Answers; Final Examination Questions and Answers; Notes on the Examinations; Correspondence.

The Preliminary Examination Journal and Students' Literary Magazine. Edited by JAMES ERLE BENHAM, formerly of King's College, London. Now complete, in 18 numbers, and giving all the Questions and Answers from February, 1871, to May, 1875, both inclusive, bound in cloth, price 18*s.* The numbers may still be had separately, price 1*s.* each, by post 1*s.* 1*d.*

*** *For complete Catalogue, see end of this Book.*

LAW WORKS FOR STUDENTS—*continued.*

Boyle's Précis of an Action at Common Law. 8vo. 5*s.* cloth.

Mosely's Articled Clerks' Handy Book, with Directions as to course of Study and other useful Information. 2nd Edition, by BEDFORD. Post 8vo. 8*s.* 6*d.* cloth.

Roberts' Principles of the Court of Equity: a First Book on Equity Jurisprudence. Third Edition. 8vo. 18*s.* cloth.

"To the student class of our readers we cordially recommend it."—*Law Journal.*

Drewry's Forms of Claims and Defences in the Chancery Division of the High Court of Justice. Post 8vo. 9*s.* cloth.

"On the whole we can thoroughly recommend it to our readers."—*Law Examination Journal.*

Bedford's Final Examination Guide to the Practice of the Supreme Court of Judicature. Questions and Answers. 8vo. 7*s.* 6*d.* cloth.

Bedford's Final Guide to the Law of Probate and Divorce. Questions and Answers. 2nd Edit. Post 8vo. [*In the press*

Bedford's Table of Leading Statutes for the Intermediate and Final Examination in Law, Equity and Conveyancing. 1*s.* on a sheet.

Seaborne's Law of Vendors and Purchasers of Real Property. 2nd Edition. Post 8vo. 10*s.* 6*d.* cloth.

"The student will find this book a useful introduction to a dry and difficult subject."—*Law Examination Journal.*

Lewis's Principles of Conveyancing Explained and Illustrated by Concise Precedents. 8vo. 18*s.* cloth.

"Mr. Lewis has contributed a valuable aid to the Law Student."—*Law Times.*

Barry's Treatise on the Practice of Conveyancing. 8vo. 18*s.* cloth.

"The treatise is the production of a person of great merit."—*Solicitors' Journal.*

Powell's Principles and Practice of the Law of Evidence. Fourth Edition. By J. CUTLER, B.A., and E. F. GRIFFIN, B.A., Barristers-at-Law. In 8vo. 18*s.* cloth.

Cutler and Griffin's Analysis of the Indian Penal Code. 8vo. 6*s.* cloth.

Cutler on Reporting Cases for the Examinations by Selected Candidates for the Civil Service of India. 8vo. 1*s.* sewed.

M. Ortolan's History of the Roman Law, translated into English (*with the Author's permission*), and Supplemented by a Chronometrical Chart of Roman History, by I. T. PRICHARD and D. NASMITH, Esqrs., Barristers-at-Law. 8vo. 28*s.* cloth.

Nasmith's Institutes of English Law. 4 vols. Post 8vo. 30*s.* cloth.

*** For [illegible] this Book.